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CONVEYANCER'S NOTEBOOK

COMMORIENTES CLAUSES

It should be automatic for a draftsman of a will to include a commorientes clause unless there is special reason for its omission. It is true that more than one leading precedent book on wills is singularly remiss on the point, but perhaps that is due to the fact that they are edited by members of the Bar who are only responsible for settling a very small proportion of the number of wills. It might have been thought that these clauses would not require excessive consideration, but Mr. J. G. Monroe in a passage in [1956] B.T.R. 228 struck terror into our hearts and the editor of the *British Tax Review* returned to the subject in [1957] B.T.R. 293. The original passage stated that "it is a common practice to make gifts contingent on survivorship for a specified period such as one month. The lapse of time before probate is granted is usually such that a period of this sort causes no inconvenience. It would seem that for this to be properly effective there should be an express provision that intermediate income should be accumulated and added to capital. If this is not done the intermediate income will be payable to adult persons contingently entitled (under Trustee Act, 1925, s. 31 (1) (ii)) and there could still be a claim for duty: *Re Jones' Will Trusts* [1947] Ch. 48. Such a gift should not be made contingent on survival until the grant of representation without some words being added to keep the contingency within the rule against perpetuities."

The Trustee Act, 1925, s. 31 (1) (ii), provides for the case of a person of full age who is contingently entitled to property. Then, unless the income is otherwise disposed of, the trustees must pay it to him until either he attains a vested interest or dies or his

interest fails. Naturally, the property must carry the intermediate income, as does the residue of an estate. In *Re Jones' Will Trusts* the deceased was entitled to residue contingently on attaining the age of twenty-five years and died under that age. It was held that estate duty became payable on the capital of the residue, for the deceased was entitled to income. Despite the imperative terms of section 31 (1) (ii) the Court of Appeal held in *Re Turner's Will Trusts* [1937] Ch. 15 that section 69 (2) applies to the provision, which is accordingly subject to contrary intention.

Commorientes clauses fall into two main groups, either being applicable to some particular gift or dealing generally with all gifts. Mr. Monroe's point may well be valid in relation to the former: what happens to the income during the commorientes period is a matter of construction and it should be simple enough to provide for the destination of the income. A general clause in common use is: "No person shall take any interest under this my will unless he or she survives me by at least one calendar month and any person not so surviving me shall be deemed to predecease me." Under such a clause, as it seems to us, no beneficiary can claim anything, capital or income, unless he survives for a month. Although he is contingently entitled to capital, the clause in terms negatives any interest under the will if he does not survive for a month and this must include income. It is true that in *Re Jones' Will Trusts* [1947] Ch., at p. 52, Roxburgh J. said that it was possible to contend that the right to income arises not under the will but under the Trustee Act, 1925, s. 31 (1), but this seems hardly consistent with the reasoning of the decision in *Re Turner's Will Trusts*.

This, however, does not quite dispose of the matter, for what happens to the income during the month? Either it must be accumulated or there is an intestacy as to it. There can really be no doubt as to the testator's intention: the income is to go as income to the person in fact entitled after the expiration of the commorientes period. If that person is absolutely entitled to the capital there would be no harm in inserting a provision for accumulation, but if he is only entitled to a life interest the testator would hardly wish the income added to capital.

The difficulty is to draft a standard clause which can be inserted more or less automatically. We are by no means convinced that a clause in the terms set forth above does not meet the case, but a cautious draftsman may prefer the following:

> "Any person who does not survive me by at least one calendar month shall be deemed to have predeceased me for

all the purposes of this my will or the devolution of my estate and the income from my estate during the period of one calendar month from my death shall be accumulated [and added to capital] accordingly."

It will be noted that the clause picks up the case of a possible partial intestacy.

It is hardly necessary to remind readers that double duty would not be payable if the potential beneficiary dying within the commorientes period were the testator's spouse.

Caprice in the Law of Intestate Succession

Our readers may remember Mr. Oliver Lodge's article with the above title in Vol. 20, at p. 399, where he pointed out that the new section 47 (5) of the Administration of Estates Act, 1925, introduced by the Intestates' Estates Act, 1952, appeared to have introduced a change in the law of intestate succession with a most capricious effect. One of the principles of intestacy is representation *per stirpes*, but the subsection appeared to have excluded descendants of brothers and sisters and uncles and aunts unless at least one brother or sister or uncle or aunt survived. Mr. Turing in a letter published in Vol. 20, at p. 512, after referring to the larger lunacy that Mr. Lodge had promised us, sought to argue that the subsection did not mean what it clearly did.

In *Re Lockwood* [1937] 3 W.L.R. 837 (noted *post*, p. 66) an intestate left first cousins only surviving and the Crown promptly claimed the estate. Ironically, Mr. Lodge had to argue against the views expressed in his article and in favour of Mr. Turing. Honours were divided, for Harman J. decided in favour of Mr. Turing's conclusion but clearly had difficulty in demolishing the arguments contained in the article to which he referred at page 841. The decision is manifest common sense: it is not often that a whole subsection can be treated as *pro non scripto*, but Maxwell on *Interpretation of Statutes* gives the principle: "the difficulty lies in deciding between words that are plain but absurd and words that are so absurd as not to be deemed plain."

Land Registry Notice: Kent

On March 1, 1957, compulsory registration of title began in the following parts of the County of Kent:—

The municipal boroughs of Chatham, Gillingham and Gravesend; the City of Rochester; the urban districts of Swanscombe and Northfleet; and the rural district of Strood.

We have received a notice from the Chief Land Registrar drawing attention to the fact that on January 1, 1958, compulsory registration began in the following further parts of Kent:—

> The City of Canterbury; the municipal boroughs of Deal, Dover, Margate, Ramsgate and Sandwich; the urban district of Broadstairs and St. Peters; and the rural districts of Bridge-Blean, Dover and Eastry.

Maps showing the boundaries of these areas have been deposited for inspection at the offices of the undermentioned local Law Societies.

Bromley & District Law Society,
18, St. Mary's Avenue,
Shortlands,
Bromley,
Kent.

Gravesend & District Law Society,
77, New Road,
Gravesend.

Isle of Thanet Law Society,
28, Cavendish Street,
Ramsgate.

Kent Law Society,
42, Earl Street,
Maidstone.

Tunbridge Wells, Tonbridge & District Law Society,
11, Church Road,
Tunbridge Wells.

Rochester, Chatham & Gillingham Law Society,
18, Star Hill,
Rochester.

When a reference to a deposited map proves inconclusive, H.M. Land Registry may be consulted either by writing or by telephone (HOLborn 3488, Extension 130).

We may remind readers that compulsory registration begins in the following further parts of Kent on October 1, 1958:—

> The municipal boroughs of Faversham, Folkestone, Hythe, Lydd, Maidstone, New Romney, Queenborough and Tenterden; the urban districts of Ashford, Herne Bay, Sheerness, Sittingbourne and Milton, and Whitstable; and the rural districts of Cranbrook, East Ashford, Elham, Hollingbourne, Maidstone, Malling, Romney Marsh, Sheppey, Swale, Tenterden and West Ashford.

The remainder of Kent, the part nearest to London, does not become subject to compulsory registration until January 1, 1961.

THE RENT ACT, 1957—(4)

By Donald Keating, b.a., Barrister-at-Law
and
Christopher Priday, b.a., Barrister-at-Law

Abatement of Rent for Disrepair

The provisions relating to abatement of rent for disrepair are contained in Part II of the First Schedule to the 1957 Act. They are detailed and not easy to follow. The difficulty arises not from ambiguities but from the order of arrangement of the subject-matter which is set out in a logical rather than a chronological order. It is proposed, therefore, to discuss the matter in stages corresponding, it is thought, to those most likely to arise in practice.

1. Tenant's defects notice (Form G)

Generally. A tenant, seeking an abatement for disrepair, must serve (*a*) a notice on the landlord in the prescribed form (Form G) stating that the dwelling or some part thereof is in disrepair by reason of defects specified in the notice, and that those defects ought reasonably to be remedied, having due regard to the age, character and locality of the dwelling and requesting the landlord to remedy them (*b*). Both a statutory and a contractual tenant can serve a notice and be entitled to the benefit of the provisions (*c*). A copy must be kept.

Drafting of notice. The notice is the basic document in the whole procedure. No defect can be included in the certificate of disrepair unless it was in the notice (*d*) so that the notice must be wide enough to include all defects upon which the tenant may rely and at the same time the defects must be drafted with sufficient exactness to form the proper subject of a certificate of disrepair. It may be that the court will permit local authorities a certain

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(*a*) For service of documents, see s. 167, Housing Act, 1936, applied by Sched. VI, para. 23.
(*b*) Sched. I, para. 3.
(*c*) See Sched. I, para. 3, "the tenant under a controlled tenancy . . ." and see also s. 25.
(*d*) Sched. I, para. 4 (2).

discretion in translating a layman's grumble into a surveyor's allegation of a defect but the discretion would be narrow and cannot extend to adding anything to the tenant's statement of defects. There is no power to add to the defects by way of amendment.

The form divides defects into six heads—external structure; internal structure; external decoration; internal decoration; fixtures and fittings; other defects of repair. Apart from this, there is no definition of the relevant terms and the meaning of defects must be sought in the general description set out under "Generally" above. Four points can be noted. First, the premises must be in disrepair by reason of the defects. Thus, defects inherent in the construction or design such as, for example, the absence of a damp-proof course (*e*) cannot be relied on. Second, the defects must be such that they "ought reasonably to be remedied." Third, the words just quoted are qualified by, "having due regard to the age, character and locality of the premises." The word "due" is important. It shows that while the age, character and locality of the premises must always be considered on the question of whether the defects ought reasonably to be remedied there can be other considerations. However, it is submitted that matters purely personal to the landlord or tenant, such as poverty or ill-health, are irrelevant. Fourth, the tenant should not include defects in the state of internal decorative repair unless the landlord is responsible for such repair under the terms of the tenancy or has elected to be treated as responsible therefor (*ee*).

If the dwelling, the subject-matter of the tenancy, forms part of any other premises owned by or under the control of the landlord or a superior landlord, any disrepair of the roof or of any other part of those premises which results, or may result, in disrepair of the dwelling, and any disrepair of any staircase or other approach to the dwelling contained in those premises is treated as if it were disrepair of the dwelling (*f*).

2. Landlord's Form H undertaking

An opportunity is given at an early stage for landlord and tenant to agree as to what work should be done. The landlord can give an undertaking in the prescribed form (Form H) to remedy the specified defects or such of them as the tenant may agree in writing to accept as sufficient (*g*). If the undertaking is given the

(*e*) See *Pembery* v. *Lamdin* [1940] 2 All E.R. 434.

(*ee*) See 4 (2) and 11 (1); and see also Cancellation of Certificate of Disrepair, *post*, p. 10. For election see (1957) 21 Conv.(N.S.) p. 334.

(*f*) Sched. I, para. 13.

(*g*) Sched. I, para. 4 (1).

local authority need not be concerned with the procedure unless subsequently the landlord or the tenant applies for a certificate stating whether or not the defects have been remedied (*gg*).

3. Tenant's application for certificate of disrepair

If, on the expiration of six weeks from the service of his notice of defects, any of the defects remain unremedied and there has been no such undertaking as just described, the tenant can apply to the local authority in the prescribed form (Form I) for a certificate of disrepair (*g*). The application must be accompanied by a copy of the notice of defects (*h*).

4. Local authority's proposal notice

In considering the application, the local authority must treat the landlord as responsible for internal decorative repairs if the tenant's application alleges that the landlord is responsible or has elected to be treated as responsible therefor (*i*), but in any other case it must treat the landlord as not responsible for such repairs (*i*). Subject to this the local authority is not concerned with obligations between the landlord and the tenant or with the origin of any defect (*k*). Their only concern is whether they are satisfied that the dwelling or any part thereof is in disrepair by reason of defects specified in the tenant's notice and that all or any of the defects ought reasonably to be remedied having due regard to the age, character and locality of the dwelling (*l*). If so satisfied the local authority is under a duty to issue a certificate of disrepair (*l*). But before doing this they must have first served on the landlord a notice in the prescribed form (Form J) stating that they propose to issue the certificate and specifying the defects to which it is to relate (*m*).

5. Landlord's Form K undertaking

The landlord now has a second opportunity to give an undertaking. Within three weeks of the service of the proposal notice he can give an undertaking in the prescribed form (Form K) to remedy the defects specified in the proposal notice (*m*). There is no provision for bargaining at this stage; his undertaking must relate to "the" defects but it is submitted that a local authority could withdraw its proposal notice if persuaded that one or more

(*gg*) See *post*, p. 11, Breach of Undertaking.
(*h*) *Ibid.*; there must also be a fee of 2s. 6d. For its deduction from rent by tenant, see para. 12.
(*i*) Sched. I, para. 11 (2).
(*k*) Sched. I, para. 4 (4).
(*l*) Sched. I, para. 4 (2).
(*m*) Sched. I, para. 5.

defects should be omitted and serve a new notice in respect of which the landlord could give an undertaking.

In four cases, the local authority can refuse to accept the landlord's undertaking. They are examples of previous actions which might suggest that the landlord would not keep his undertaking (*mm*). It has not been thought necessary to set them out *in extenso* here; it is sufficient to note that while the local authority has an absolute discretion whether or not to accept an undertaking if one of these cases is applicable, they have no general discretion. In other cases they must accept an undertaking.

6. The certificate of disrepair—its issue

If no undertaking is given within the three weeks or an undertaking is refused on one of the grounds specified, the local authority must issue a certificate of disrepair (*n*) (Form L). The matters upon which the local authority must be satisfied before issuing the certificate are set out under (4) above.

7. The certificate of disrepair—its effect

The issue of the certificate of disrepair may cause a reduction in the rent recoverable from the tenant. This must be considered under three heads:

(a) Any notice of increase served during the period beginning six months before the date of the application to the local authority for the certificate of disrepair and ending when the certificate ceases to be in force is ineffective as respects any rental period beginning while the certificate is in force except in so far as it specifies an increase for rates or for improvements completed after July 5, 1957 (*o*). Further, a notice of increase served while a certificate of disrepair is in force is void unless it contains a statement that it will not take effect while the certificate is in force except in so far as any increase specified in it is for rates or improvements completed after July 5, 1957 (*p*). The result is to preserve increases for rates and improvements and to allow for such increases being made while a certificate of disrepair is in force. To take an example ignoring rates and improvements: a dwelling of 1956 gross value £30 was let on July 6, 1957, at 17s. 6d. per week. A notice of increase served after, or within six months before, the date of application resulted in 2 × 30 = £60 = 23s. per week (*q*). Under this head the rent recoverable returns to 17s. 6d. per week.

(*mm*) Sched. 1, para. 5, proviso.
(*n*) Sched. I, paras. 4 (2) and 5.
(*o*) Sched. I, para. 7 (1).
(*p*) Sched. I, para. 7 (3).
(*q*) Calculations are for illustration only. Their accuracy is not warranted.

(b) As respects any rental period beginning while the certificate of disrepair is in force the rent limit becomes $1\frac{1}{3}$ × the 1956 gross value, notwithstanding that this may be less than the recoverable rent on July 6, 1957 (*r*). Thus, in the example above the rent limit will be $1\frac{1}{3}$ × £30 = £40 = 15s. 4d. per week. In each case the calculation under (a) and (b) must be made although in this example it is the calculation under (b) which gives the limit of rent recoverable from the tenant. But say the recoverable rent on July 6, 1957, had been 15s. 0d. in that case the calculation under head (a) would give the new rent limit, *i.e.*, 15s. 0d. because there would have been no valid notice of increase to increase the rent up to the reduced rent limit of 15s. 4d.

(c) If the rent limit is reduced under heads (a) or (b) above the tenant can in many cases withhold part of the rent paid before the certificate was granted (*s*). He has the right to do this only during rental periods beginning while the certificate continues in force (*s*). In aggregate he cannot withhold more than would have been made irrecoverable if the certificate had been in force during rental periods beginning on or after the date of application for the certificate and before it was granted (*s*). The amount he can withhold for a rental period is the amount made irrecoverable under heads (a) and (b) for the final period beginning while the certificate is in force (*s*). Thus, in the example above, say there were six complete weekly rental periods between the date of application and the granting of the certificate. From the reduced rent limit of 15s. 4d. he can deduct 23s. − 15s. 4d. = 7s. 8d. so that he need only pay 15s. 4d. − 7s. 8d. = 7s. 8d. per week for six weeks unless during that six weeks the certificate has ceased to be in force, in which case the rent limit reverts to 23s. There is no other way of recovering the 7s. 8d. paid between application for and issue of the certificate.

8. Certificate of disrepair—appeals

(a) *By tenant.* Where the local authority fails to issue a certificate of disrepair, the tenant can appeal to the county court (*t*). If the court is satisfied as respects any defects that a certificate ought to have been issued it will direct the local authority to proceed on the footing that, in relation to those defects, they are

(*r*) Sched. I, para. 7 (2).

(*s*) Sched. I, para. 7 (4). In practice this right will probably only be of value to tenant paying rent weekly or monthly.

(*t*) All applications are by way of originating application; for procedure, see The Rent Restrictions Rules, 1957 (S.I. 1957, No. 1137).

satisfied that a certificate should be issued (*u*). If a certificate has been issued but the tenant thinks it inadequate he can apply to the county court which, if satisfied that any defect not specified in the certificate ought to have been specified therein, will order that the defect shall be deemed to have been specified in the certificate (*a*). In neither case can the court include defects not specified in the tenant's original notice (*b*).

(b) *By landlord.* The grounds of appeal are considered below under the next heading. Where the landlord has applied to the county court under paragraph 4 (see below) for cancellation of the certificate as respects all the defects specified therein and the application was made within three weeks of the issue of the certificate the rent limit remains unaffected by the certificate while the proceedings are pending (*c*).

9. Cancellation of certificate of disrepair

There are two ways in which the landlord can have the certificate cancelled and so remove the clog to his right to the ordinary rent limit. They are by application under paragraph 4 to the county court and by application under paragraph 6 to the local authority with a right of appeal to the county court. He may have to use both methods, the first to have certain defects struck out, the second after he has remedied the remaining defects.

(a) *Paragraph 4 application.* If the court is satisfied as respects any defect specified in the certificate that it is one for which the tenant is responsible it will cancel the certificate as respects that defect (*d*). Similarly, it will cancel any defect in the state of internal decorative repair if the landlord is neither responsible for nor has elected to be responsible for (*e*) internal decorative repairs (*f*). A defect for which the tenant is responsible is one for the remedying of which, as between the landlord and the tenant, the tenant is responsible, or a defect which is due to any act, neglect or default of the tenant or any person claiming under him or any breach by the tenant or such a person of any express agreement (*g*).

(*u*) Sched. I, para. 4 (3). For the matters upon which the local authority must be satisfied, see (2) and (4) above, and for the procedure which follows when they are satisfied, see (4) and (5) above.
(*a*) Sched. I, para. 4 (3).
(*b*) See (1), above.
(*c*) Sched. I, para. 7 (5).
(*d*) Sched. I, para. 4 (4).
(*e*) (1957) 21 Conv.(N.S.) p. 334.
(*f*) Sched. I, paras. 4 (4), 11 (1) and 11 (3).
(*g*) Sched. I, para. 15.

There is a further general ground for cancellation, namely, that, as respects any defect specified in the certificate, it ought not to have been specified (*h*). This, in effect, gives the county court an appellate jurisdiction in respect of any defect specified in the certificate. Among the grounds of appeal that might be open are the questions considered under (1) above, *e.g.*, whether the dwelling is in disrepair by reason of a defect or whether it is reasonable to include the defect in the certificate.

Where a certificate is cancelled under paragraph 4 as respects all the defects it is deemed never to have had effect, and where it is so cancelled as respects some only of the defects it is deemed never to have specified those defects (*i*).

(b) *Paragraph 6 application.* The landlord can apply (by Form M) to the local authority for cancellation of the certificate on the ground that the defects have been remedied (*k*). They must then serve on the tenant a notice (Form N) to the effect that unless an objection from the tenant is received by them within three weeks of the service of the notice on the ground that the defects, or any of them, have not been remedied, they propose to cancel the certificate (*l*). If no objection is received or if, in the opinion of the local authority, the objection is not justified, they must cancel the certificate as from the date of the application or such later date as appears to them to be the date on which the defects were remedied (*m*). Upon the tenant's application, the county court can set aside the cancellation if satisfied that the certificate ought not to have been cancelled (*n*). Conversely, the landlord can apply to the county court if the local authority have not cancelled the certificate, and if the court is satisfied that the certificate ought to have been cancelled by the local authority it will order that it shall cease to have effect as from the date of the order or such earlier date as it may specify (*o*).

10. Breach of undertaking

Either a Form H or a Form K undertaking (see above) prevents the issue of a certificate of disrepair and the consequences which flow from it. But if at the end of six months from the giving of the undertaking any defects to which it relates remain unremedied the same consequences follow as if a certificate had then been issued

(*h*) Sched. I, para. 5.
(*i*) Sched. I, para. 4 (6).
(*k*) A fee of 2s. 6d. is payable—Sched. I, para. 12 (3).
(*l*) Sched. I, para. 6 (1).
(*m*) Sched. I, para. 6 (2).
(*n*) Sched. I, para. 6 (4).
(*o*) Sched. I, para. 6 (3).

and had continued in force until the remedying of the defects (*p*). In the case of a Form H undertaking, *i.e.*, given before an application for a certificate, the date of the undertaking is regarded as the date of the application (*p*). This is necessary to ascertain whether a notice of increase was given within six months of the application and to calculate the amount, if any, which the tenant may withhold from the rent (*q*). The Act encourages a landlord to give an undertaking, for in this way he reduces or can eliminate the loss he would otherwise suffer from a reduction in the rent recoverable from the tenant.

Where an undertaking has been given, landlord or tenant can apply (on Form O) to the local authority for a certificate (Form P) stating whether any, and if so which, of the defects to which the undertaking relates remain unremedied (*r*). Such a certificate is, in any proceedings, evidence of the matters certified until the contrary is proved (*s*).

11. Sub-tenancies

A sub-tenant has the same rights under the Schedule as against the tenant as the latter has against the landlord (*t*). Further, he may be able to take advantage of a certificate of disrepair issued to the tenant. This can happen when a certificate has been issued to the tenant of a dwelling and the dwelling, or any part thereof which is in disrepair by reason of defects specified in the certificate, is let to a sub-tenant on a controlled tenancy and no certificate of disrepair has been issued to the sub-tenant in respect of those defects (*u*). Then the same consequences follow as between tenant and sub-tenant as if a certificate of disrepair had been issued to the sub-tenant when the certificate was issued to the tenant, had specified the same defects as the certificate issued to the tenant, had been issued on an application made by the sub-tenant when the tenant applied for the certificate issued to him, and had continued in force for the same period as that certificate (*u*). The same results follow as between tenant and sub-tenant where there has been a breach of an undertaking by the landlord (*a*) (see above).

12. Existing certificate of disrepair

A certificate of disrepair granted by a local authority under the 1954 Act or a certificate of the sanitary authority having effect

(*p*) Sched. I, para. 8 (1).
(*q*) See above "Certificate of disrepair—its effect."
(*r*) Sched. I, para. 8 (2).
(*s*) Sched. I, para. 8 (3).
(*t*) Sched. I, para. 9 (3).
(*u*) Sched. I, para. 9 (1).
(*a*) Sched. I, para. 9 (2).

as if it were a certificate of disrepair under the 1954 Act and in force on July 5, 1957, continues to have effect as if it were a certificate of disrepair under the 1957 Act to the extent that it specifies any defects as regard the state of repair of the dwelling (*b*). When such a certificate ceases to have effect, the rent limit is ascertained as if the certificate ceased to have effect immediately before the basic rental period (*c*).

13. Change of parties

The provisions of Part II of the First Schedule, *i.e.*, as to disrepair, apply notwithstanding any change in the person of the landlord or the tenant (*d*).

(*b*) Sched. VII, para. 3 (1).

(*c*) Sched. VII, para. 3 (2). For ascertainment of rent limit and meaning of basic rental period, see (1957) 21 Conv.(N.S.) pp. 332, 335, 336. For discussion of a nice point which could arise where the dwelling was formerly subject to old control, see Bramall, *Rent Acts Manual*, p. 123.

(*d*) Sched. I, para. 10.

EQUITABLE INTERESTS IN REGISTERED LAND

By F. R. Crane, ll.b., Solicitor

In a previous article (*a*) the present writer discussed some problems of priority arising in unregistered conveyancing on the assignment of equitable interests in land. The present article was originally intended to be a counterpart dealing with registered conveyancing, but it seemed impracticable to stop short of a general discussion of the position of equitable interests under the Land Registration Act and Rules, 1925 (*b*). The recent decision in *Bridges* v. *Mees* (*c*) has, it is thought, given more point to such a discussion.

The Chief Land Registrar has very kindly read this article in draft and permitted the inclusion of his views on a number of points. He has made these comments subject to the overriding consideration that " there should not be too great rigidity in applying the provisions to particular circumstances, and consequently I am always prepared to exercise such discretion as is vested in me to ensure that the interests of the parties concerned are properly protected by entries on the register "—remarks which one may respectfully say strike the authentic Registry note. The importance in practice of knowing the probable attitude of the Registry to any application is too obvious to need stressing here, and the writer would like to express his sincere thanks to the Chief Land Registrar for his courtesy and help in this matter. It should be added that unless clearly stated to be the Registry view the opinions here expressed are the writer's own and, of course, he alone bears responsibility for them.

1. The Classification of Equitable Interests in Registered Land

The language of the Land Registration Act necessitates a threefold or fourfold classification of interests in registered land (*d*),

(*a*) " Equitable Interests in Land: Some Problems of Priority " (1956) 20 Conv.(N.S.) 444. That article was based on *Rust* v. *Goodale* [1957] Ch. 33.

(*b*) The Rules have the same force as if enacted in the Act: L.R.A., s. 144 (2).

(*c*) [1957] Ch. 475.

(*d*) See Key and Elphinstone, *Precedents in Conveyancing* (15th ed.), Vol. 3, pp. 2–4, 18–24; (this work is hereinafter referred to as K. & E.); Megarry and Wade, *Law of Real Property*, p. 932.

viz., registered interests, overriding interests and minor interests, with registered charges perhaps best treated as a fourth group.

Registered interests (sometimes also called registrable interests), not specifically defined in the Act, are those interests to which a title can be registered by a proprietor (*e*); they comprise only legal estates in fee simple or for a term of years (*f*) (with certain exceptions (*g*)) and some legal incorporeal interests (*h*).

Overriding interests are defined as interests not entered on the register "but subject to which registered dispositions are by this Act to take effect" (*i*). By section 70 "All registered land shall, unless . . . the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting . . ."; then follows a list (*k*).

Some overriding interests appear on the register (*l*). First, the Registrar must on first registration note any "easement, right, privilege or benefit created by an instrument" which appears on the title and adversely affects the land (*m*). Secondly, any disposition of an interest in registered land must, with certain exceptions, be completed by registration and consequently by entry on the register (*n*). "Dispositions" are confined to dealings with legal estates and interests (*o*); however, a lease for twenty-one years or less cannot be registered and if granted at a rent without a fine (when it constitutes an overriding interest) need not be noted on the lessor's title; nor need an easement, right or privilege be registered except as appurtenant to registered land (*p*). Thirdly, the Registrar may enter a notice of any overriding interest against the servient land (*q*). The result is that legal estates and interests expressly created by an instrument will generally appear on the register but that other overriding interests probably will not. Noting as appurtenant, which seems likely to be confined to incorporeal interests such as easements or profits *à prendre*, apparently confers the benefits of indefeasibility of title under the Act and consequently the

(*e*) "Registered land" means any estate or interest in land the title to which is registered: L.R.A., s. 3 (xxiv).
(*f*) L.R.A., ss. 2 (i), 3 (xi), 8, 19, 22.
(*g*) No title may be registered to a mortgage term while the right of redemption subsists, to leases for 21 years or less, or to leases containing an absolute prohibition against assignment: L.R.A., ss. 8, 19, 22.
(*h*) L.R.R., 50–55; see K. & E., pp. 106–108.
(*i*) L.R.A., s. 3 (xvi).
(*k*) L.R.A., s. 70 (1), paras. (a) to (l).
(*l*) See generally K. & E., pp. 57–61.
(*m*) L.R.A., s. 70 (2).
(*n*) L.R.A., ss. 19 (2), 22 (2).
(*o*) L.R.A., ss. 18, 21.
(*p*) L.R.A., ss. 19 (2), 22 (2), provisos; a mortgage term, where the right of redemption is outstanding, is not separately registrable.
(*q*) L.R.A., s. 70 (3); see also L.R.R., 251–258.

character of a registered interest (*r*). Noting as adverse, which is in no way restricted, is by entry of notice on the register, whereby any disposition by the registered proprietor will be subject to the interest so protected (*s*).

Minor interests are defined as:—

> " interests not capable of being created or disposed of by registered dispositions and capable of being overridden (whether or not a purchaser has notice thereof) by the proprietor unless protected as provided by this Act, and all rights and interests which are not registered or protected on the register and are not overriding interests, and include (a) in the case of land held on trust for sale, all interests and powers which are under the Law of Property Act, 1925, capable of being overridden by trustees for sale, whether or not such interests and powers are so protected and (b) in the case of settled land, all interests and powers which are under the Settled Land Act, 1925, and the Law of Property Act, 1925, or either of them, capable of being overridden by the tenant for life or statutory owner, whether or not such interests and powers are so protected as aforesaid " (*t*).

Other equitable interests are not enumerated but it is clear that they can almost all be protected by notice, restriction, caution or inhibition (*u*).

These definitions must be read with sections 20 and 23 of the Act, prescribing the effect of registered dispositions. Such a disposition, if for valuable consideration, confers on the grantee the legal estate expressed to be conferred or created " subject (a) to the incumbrances and other entries (if any) appearing on the register, and (b) unless the contrary is expressed on the register, to the overriding interests, if any, affecting the estate transferred or created, but free from all other estates and interests whatsoever, including estates and interests of Her Majesty . . ." (*a*). A transferee who

(*r*) L.R.R., 254; K. & E., pp. 57–61. (*s*) L.R.A., s. 52.

(*t*) L.R.A., s. 3 (xv).

(*u*) L.R.A., ss. 48–59; L.R.R., 186–246. See generally two invaluable articles by Mr. T. B. F. Ruoff: " The Conclusiveness of Registered Titles " (1953) 17 Conv.(N.S.) 39 and " The Rights of Third Parties in Registered Property " (1953) 17 Conv.(N.S.) 105. The registered charge of registered land is anomalous. It is created by a registered disposition (L.R.A., ss. 3 (xxii), 18 (4), 21 (4)) yet is entered on the charges register of the mortgagor's title (s. 26)—a mortgagee's title cannot be separately registered while the right of redemption exists (*supra*, n. (*g*)); a charge certificate is issued and the land certificate remains in the Registry—and so would not bind a transferee for value unless protected on the register (ss. 20, 23). Consequently successive editors of K. & E. have differed as to its classification: see pp. 23–24.

(*a*) L.R.A., ss. 20 (i), 23 (i); if the title is not absolute or is leasehold there are further qualifications not here relevant: ss. 20 (2) (3), 23 (2) (3) (4). As to interests of the Crown, see *Att.-Gen.* v. *Parsons* [1956] A.C. 421.

does not give value takes subject also to all minor interests affecting the transferor (*b*).

The above is, of course, a conveyancing classification. The Land Registration Act and Rules are concerned simply to prescribe the titles that may be registered and with the methods of determining whether third party rights remain enforceable against that title on a transfer, particularly a transfer for value. In unregistered conveyancing the latter point depends, normally, on whether the incumbrance is legal or equitable, taking into account also the provisions concerning overreaching and registration; even here, however, after 1925 the priority of all mortgages, legal or equitable, depends on the principles applicable to equitable interests (*c*). In registered conveyancing the legal or equitable nature of an incumbrance need not be the only or even the principal criterion of its classification as an overriding or minor interest. For example, the practicability or convenience of requiring protection by an entry on the register may be equally important. It is submitted that the whole structure of the Land Registration Act, particularly the list in section 70 of overriding interests without reference to their legal or equitable character, tacitly abandons the distinction between legal and equitable interests as the chief basis of the classification of incumbrances (*d*). The courts have adopted this approach in holding agreements for leases or for sale to be capable of constituting overriding interests (*e*).

The conclusion is, therefore, that legal or equitable interests in land may subsist as either overriding or minor interests, according as they fall within the relevant definitions. However, these definitions are not mutually exclusive. As a result, the owner of the incumbrance can either rely on its overriding character, or protect it on the register. So much seems clear (*f*), but a further and more difficult question is whether protection on the register destroys the right to claim an overriding interest. For example, suppose an equitable interest conferring possession is protected by a caution against dealings, and on this being warned off the incumbrancer

(*b*) L.R.A., ss. 20 (4), 23 (5).

(*c*) Priority depends on having the title deeds, or on registration—that is, on notice in some form: L.P.A., s. 97; L.C.A., ss. 10, 13. Only if a mortgagee is negligent with the deeds may the distinction between legal and equitable mortgages be relevant to priority.

(*d*) See K. & E., pp. 44–45, for a somewhat more conservative view. For other purposes, of course, the distinction remains important in registered conveyancing, *e.g.*, possession of the land and land certificate, or the remedies of a mortgagee.

(*e*) *Woolwich Equitable Building Society* v. *Marshall* [1952] Ch. 1; *Mornington Permanent Building Society* v. *Kenway* [1953] Ch. 382; *Bridges* v. *Mees* [1957] Ch. 475; *post*, p. 19.

(*f*) See the discussion in the remainder of this article.

takes no action (*g*). The Act merely says that "the registered land . . . may be dealt with in the same manner as if no caution had been lodged" (*h*) but presumably the interpretation of the Act as a whole, or the doctrine of estoppel, would prevent the incumbrancer then claiming an overriding interest. If this submission is correct it seems proper to describe a dual-character incumbrance of this sort as an overriding interest till protected and thereafter as a minor interest, even though initially it did not strictly come within the definition of a minor interest because protection on the register was not essential to its validity against a transferee for value of the registered estate.

2. Equitable Interests in Registered Land as Overriding Interests by virtue of Possession

The Land Registration Act, 1925, s. 70 (1), provides that "All registered land shall, unless under the provisions of this Act the contrary is expressed on the register, be deemed to be subject to such of the following overriding interests as may be for the time being subsisting in reference thereto . . . (g) The rights of every person in actual occupation of the land or in receipt of the rents and profits thereof, save where inquiry is made of such person and the rights are not disclosed."

(1) Decisions concerning agreements for leases and contracts for sale

It is perfectly clear that an agreement for a lease or a contract for sale can subsist as a minor interest protected by notice on the register (*i*). Moreover, there is express power in the Act for the registered proprietor to enter into a contract and "subject to any disposition for valuable consideration which may be registered or protected on the register before the contract is completed or protected on the register, the contract may be enforced as a minor interest against any succeeding proprietor in like manner and to the same extent as if the land . . . had not been registered" (*k*). Here the draftsman seems to have envisaged contracts to sell or lease land as true minor interests liable to be overridden unless protected by an entry on the register. This is, of course, the position where the prospective lessee or purchaser has not taken possession. However, it was held in *Woolwich Equitable Building*

(*g*) L.R.A., ss. 54, 55.
(*h*) L.R.A., s. 55 (1).
(*i*) L.R.A., s. 48; L.R.R., s. 186. A restriction or caution could also be entered: see table prepared by Mr. T. B. F. Ruoff at (1953) 17 Conv.(N.S.) pp. 122, 123.
(*k*) L.R.A., s. 107; *cf.* s. 101.

Society v. *Marshall* (*l*) that a prospective lessee in possession under an agreement for a lease had an overriding interest under section 70 (1) (g); Danckwerts J. said the paragraph preserved "the old rule about the rights of persons in possession putting the purchaser on inquiry" (*m*). This decision was followed without discussion by Vaisey J. in *Mornington Permanent Building Society* v. *Kenway* (*n*).

In *City Permanent Building Society* v. *Miller* (*o*) the Court of Appeal held that the overriding interest created by section 70 (1) (k) —"leases for any term or interest not exceeding twenty-one years, granted at a rent without taking a fine"—was limited by the word "granted" to legal terms of years, even though the definition of a lease (*p*) includes an agreement for a lease. In that case a prospective lessee was not in possession but could have entered a caution on the register and Jenkins L.J. remarked that for this reason the decision did not "leave wholly unprotected a person holding an agreement for a grant of a lease who has not entered into actual occupation so as to qualify for the protection afforded by section 70 (1) (g) of the Land Registration Act . . ." (*q*).

The above three cases were concerned with tenancy by estoppel. More recently, in *Bridges* v. *Mees* (*r*), the same conclusion has been reached as regards a contract for sale. In 1936 the plaintiff contracted to purchase a small plot of land from a development company (the registered proprietor) for £7, which was paid in 1937. The plaintiff went into occupation in 1936 and had remained there ever since. In 1955 the defendant took a transfer from the liquidator of the development company and became the registered proprietor. Harman J. held (1) that the plaintiff had acquired a title by adverse possession, and (2) alternatively, that his occupation created an overriding interest, consisting of his equitable interest and right to call for a conveyance. The argument that section 70 (1) (g) was to be limited to rights that could not be protected on the register was firmly rejected, both on the construction of the Act and on the authorities set out above.

(2) Possession under trusts *

The Land Registration Act, s. 74, provides that "neither the registrar nor any person dealing with a registered estate shall be affected with notice of a trust, express, implied or constructive, and references to a trust shall, so far as possible, be excluded from the

(*l*) [1952] Ch. 1.
(*m*) [1952] Ch., at p. 9.
(*n*) [1953] Ch. 382.
(*o*) [1952] Ch. 840.
(*p*) L.R.A., s. 3 (x).
(*q*) [1952] Ch., at p. 854.
(*r*) [1957] Ch. 475; noted *ante*, Vol. 21 p. 385.

register." Of course this does not prevent the entry of restrictions protecting the interests of beneficiaries under settlements and trusts for sale (*s*). The question is, however, whether a beneficiary in possession under any sort of trust can claim an overriding interest against a purchaser where there is no entry on the register. In one case this situation is covered by the Act: interests acquired by adverse possession are overriding interests under section 70 (1) (f), and by section 75 the registered proprietor's title is not extinguished as in unregistered conveyancing, but he remains proprietor holding on trust for the adverse possessor till the register is rectified. Sections 74 and 75, at first sight in conflict, can be reconciled by holding that section 70 takes overriding interests out of the realm of notice altogether (*t*). It is submitted that this approach is correct and that in consequence, apart from the special case of settled land (*u*), possession under a trust will create an overriding interest.

(3) General effect of possession of registered land

The statutory provisions and the decisions discussed above justify, it is submitted, the general proposition that, unless the Act or Rules specifically provide to the contrary, any equitable interest under which possession is taken will subsist as an overriding interest unless and until it is converted into a minor interest by entry of a notice, caution, restriction or inhibition, or into a legal registered interest by registration of a disposition. If this is correct it seems to produce two, and perhaps three, substantial differences between the law applicable to registered and unregistered land.

First, in unregistered conveyancing possession is not an alternative to registration under the Land Charges Act, 1925 (*a*). Here the contrary rule in registered conveyancing seems the more likely to work justice (*b*). A purchaser or lessee can always insist on vacant possession on completion and a mortgagee, though admittedly in a more difficult position, can normally make unrestricted inquiries and inspections. On the other hand, considerable hardship may be caused if possession is lost for lack of registration, especially as the interest may have been created without legal advice and the need for registration consequently unappreciated (*c*).

(*s*) *Post*, p. 22.
(*t*) K. & E., at p. 49, n. (*g*).
(*u*) *Post*, p. 23.
(*a*) *Coventry Permanent Economic Building Society* v. *Jones* [1951] 1 All E.R. 101; *Wright* v. *Dean* [1948] Ch. 686; *Hollington Bros.* v. *Rhodes* [1951] 2 All E.R. 578; see "Tenants in Possession and Third Parties" by G. Boughen Graham (1951) 15 Conv.(N.S.) 381.
(*b*) This view is taken by Mr. H. W. R. Wade in "Land Charges Registration Reviewed," 1956 Camb.L.J. 216, at pp. 227–228.
(*c*) See the cases cited *ante*, p. 18.

Furthermore, it may not be desirable to require all equitable interests, however small, to appear on the register (*d*).

Secondly, although in *Woolwich Equitable Building Society* v. *Marshall* Danckwerts J. spoke of section 70 (1) (g) as preserving the law of unregistered conveyancing (*e*), yet in fact the section seems to go much further. In unregistered conveyancing the rule in *Hunt* v. *Luck* (*f*), as it is generally called, is one facet of the doctrine of notice, and is limited by what a purchaser should, in the eye of the law, deduce from another's possession or occupation. So it has been held that a deserted wife's occupation is not *per se* notice of her licence (*g*), and that a purchaser from a landlord is not fixed with notice of a tenant's claim to rectification of his lease (*h*), while it still seems uncertain whether occupation by a beneficiary under a trust gives notice of his equitable rights (*i*).

The Land Registration Act, however, makes registered land subject to "the rights of every person *in actual occupation* . . . save where inquiry is made of such person and the rights are not disclosed" (*k*). In the face of this plain language it seems that the above-mentioned limitations on the effect of possession cannot apply in registered conveyancing; the deserted wife and the tenant must be asked what rights they claim, and the doubt about beneficiaries is removed (*l*).

Thirdly, section 70 (1) (g) refers to "the rights of every person in actual occupation of the land *or in receipt of the rents and profits thereof*. . . ." The decision in *Hunt* v. *Luck* itself was that possession by a tenant did not give notice of the rights of the person to whom he paid his rent. Here again, the words of the Act seem to exclude this limitation from registered conveyancing. It would seem that the draftsman incorporated into section 70 (1) (g) the general definition of possession used in all the 1925 legislation to distinguish an estate or interest in possession from one in

(*d*) Leases for 21 years or less at a rent without a fine are in any event overriding interests under L.R.A., s. 70 (i) (k); it could be regarded as anomalous if a lack of formality made protection on the register necessary even though possession was taken.

(*e*) [1952] Ch. 1, at p. 9.

(*f*) [1902] 2 Ch. 428, subject now to modification by the Land Charges Act, 1925.

(*g*) *Westminster Bank, Ltd.* v. *Lee* [1956] Ch. 7; see "The Deserted Wife's Licence" by F. R. Crane (1955) 19 Conv.(N.S.), at p. 343.

(*h*) *Smith* v. *Jones* [1954] 1 W.L.R. 1089; [1954] 2 All E.R. 823, where it was held that a tenant need not be asked if he agrees the terms of his lease.

(*i*) The point was raised but not decided in *Penny* v. *Watts* (1849) 1 Macn. & G. 150 and *Nelson* v. *Holgate* (1844) 1 Coll. 203.

(*k*) s. 70 (1) (g).

(*l*) But other provisions of the Act seem to exclude beneficiaries under the Settled Land Act from the advantages of s. 70 (1) (g): see *post*, p. 23.

remainder (*m*). In the context of overriding interests the definition is obviously too wide for convenience but it will need robust interpretation to restrict it to actual physical possession of the land. The Land Registry Practice Note 24, cited later at p. 25, contemplates full effect being given to the definition.

3. The Status of Various Equitable Interests in Registered Land

(1) Agreements for leases and contracts for sale

Both agreements for leases and contracts for sale are prima facie minor interests and can be protected on the register, normally by notice (*n*), though in practice this is rarely done unless completion is to be delayed or there is some other unusual factor. If, however, there is no such entry a prospective lessee or purchaser in possession can claim an overriding interest, as has already been shown (*o*). The general proposition submitted above (*p*) is fully applicable.

(2) Equitable mortgages

Though the mere deposit of the land certificate creates a lien (*q*), an equitable mortgage by deposit is normally protected by a notice operating as a caution (*r*), and any other equitable charge may be protected by a caution (*s*). An equitable mortgagee has no right to possession without the aid of the court (*t*), and such proceedings would normally produce an entry on the register. In practice, therefore, an equitable mortgage will normally constitute a minor interest only. Nevertheless, if without any entry on the register such a mortgagee did obtain possession he would, it is submitted, be entitled to claim an overriding interest.

(3) Settled land and trusts for sale

Normally beneficial interests in settled land and under trusts for sale subsist as minor interests protected by restrictions on the

(*m*) Law of Property Act, 1925, s. 205 (1) (xix); Settled Land Act, 1925, s. 117 (1) (xix); Trustee Act, 1925, s. 68 (10); Administration of Estates Act, 1925, s. 55 (1) (xii); Land Registration Act, 1925, s. 3 (xviii). The definition, for example, removes any possible doubt that the expression "estate in fee simple absolute in possession" includes a fee simple subject to a lease, and that a person entitled to possession of settled land for his life (S.L.A., ss. 19, 20) is tenant for life of land let as well as land occupied.

(*n*) L.R.A., s. 48; L.R.R., 186; a restriction or caution can also be entered: see table at (1953) 17 Conv.(N.S.) pp. 122–123.

(*o*) *Ante*, p. 18.

(*p*) At p. 18.

(*q*) K. & E., at p. 81.

(*r*) L.R.A., s. 54; L.R.R., 239.

(*s*) See (1953) 17 Conv.(N.S.) at pp. 122–123.

(*t*) *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 74.

register. Where there is settled land the restrictions require the payment of capital money to named trustees and forbid dispositions outside the powers conferred by the Settled Land Act, 1925 (*u*). Whenever an express or statutory trust for sale appears on the title the Registrar will enter a restriction preventing dispositions, except by his order or that of the court, if the number of proprietors is reduced to one (*a*). Other restrictions may be entered in particular cases, *e.g.*, where consent is required to sale of the mansion house (*b*) or to the exercise of a trust for sale (*c*); alternatively, if the owners are shown to be beneficial joint tenants a restriction may be dispensed with (*d*). Transfers in accordance with the restrictions will overreach the beneficial interests. Pending the appointment of trustees of settled land or trusts for sale, and the consequent entry of appropriate restrictions a notice can be entered as a temporary measure of protection (*e*). Informal or unintended settlements or trusts for sale appearing on the title will result in an entry on the register because the Registrar will take the point when the relevant document is lodged for registration (*f*). Nevertheless, there may be settled land or a trust for sale without anything showing on the title (*g*). In unregistered conveyancing the estate owner can then, apparently, make a good title to a purchaser for value without notice (*h*), but it is thought that a beneficiary's possession would constitute notice, at any rate, if it indicated an adverse claim.

In such circumstances, can a beneficiary in possession of registered land claim an overriding interest? The definition of minor interests (*i*), is inconclusive, for though it expressly includes such beneficial interests, whether or not protected on the register,

(*u*) L.R.A., ss. 3 (xv), 86–92.

(*a*) L.R.A., s. 58 (3); see K. & E., pp. 255–258, for discussion as to restrictions limiting power to those of the Settled Land Act, 1925.

(*b*) Settled Land Act, 1925, s. 65.

(*c*) Law of Property Act, 1925, s. 26.

(*d*) K. & E., pp. 263–4.

(*e*) L.R.A., s. 49 (2). Entry of a notice requires deposit of the land certificate and if the registered proprietor were hostile presumably the beneficiary could caution under s. 54.

(*f*) Thus, subject to the possibility of error in the Registry on the difficult and unforeseen problems involved, neither *Bannister* v. *Bannister* [1948] 2 All E.R. 183 (conveyance subject to reservation of right to reside for life) nor *Re Duce and Boots' Contract* [1937] Ch. 642 (assent in fee simple subject to life residence by third party) would have arisen in registered conveyancing.

(*g*) *e.g.*, if A in writing declares himself trustee for B for life, etc., there will be settled land: S.L.A., s. 1 (1). Examples of informal trusts for sale are *Re Rayleigh Weir Stadium* [1954] 1 W.L.R. 786; [1954] 2 All E.R. 483 (conveyance of one-eighth share on land) and *Bull* v. *Bull* [1955] 1 Q.B. 234 (purchase in name of son with money supplied by himself and his mother).

(*h*) The Settled Land Act, 1925, s. 13, makes express provision. Dicta in *Re Rayleigh Weir Stadium*, and *Bull* v. *Bull*, *ante*, conflict, but it is submitted that the better view is that a sole estate owner who is trustee for sale can in such circumstances make title.

(*i*) Set out at *ante*, p. 30.

it also expressly excludes overriding interests. It is suggested that the language is not strong enough to exclude the general reasoning and the decisions outlined above. As regards settled land only, however, there is the further provision in section 86 (2) that "the successive or other interests created by or arising under a settlement shall . . . take effect as minor interests and not otherwise. . . ." It is therefore submitted, with some hesitation, that in the absence of any restriction or other entry on the register, a beneficiary in possession under a trust for sale can claim an overriding interest (*k*), but a beneficiary in possession of settled land cannot. Admittedly this result is anomalous and probably accidental.

(4) Bare trusts

Three types of bare trust have to be considered, the second and third being peculiar to registered land.

(a) *Bare trusts generally*

A bare or simple trust exists where A holds the legal estate on trust for B who is entitled to the whole beneficial interest. Such a trust may arise, for example, through a declaration of trust (*l*), by purchase in the name of another (*m*), or by payment of purchase money without any conveyance (*n*). In unregistered conveyancing such trusts do not fall within the provisions of the Land Charges Act, 1925, and the beneficiary must rely on the general law of notice (*o*). If the land is registered it is submitted that a beneficiary in possession can claim an overriding interest on the principles already discussed (*p*).

Section 74 of the Land Registration Act, excluding notice of trusts from transferees and the Registrar, does not, it seems, preclude a beneficiary under a bare trust from entering a caution against dealings (*q*), for Form 14 (*r*) (statutory declaration in support of a caution) gives as examples declarants who are "beneficial owner in fee simple" and "beneficially entitled to the lease referred to

(*k*) His rights, following the method of analysis adopted by Harman J. in *Bridges* v. *Mees*, *ante*, p. 19, are to have a restriction entered, or alternatively to enter a notice pending the appointment of trustees and entry of a restriction. Of course, the registered proprietor, as trustee, could appoint a second trustee, enter a restriction, and then transfer so as to override the beneficial interest.

(*l*) *Cf. Schalit* v. *Nadler* [1933] 2 K.B. 79, where an individual was trustee for a "one-man" company—not an uncommon situation.

(*m*) *Dyer* v. *Dyer* (1788) 2 Cox Eq. 92.

(*n*) *Bridges* v. *Mees* [1957] 3 W.L.R. 215; [1957] 2 All E.R. 577.

(*o*) Law of Property Act, 1925, s. 199; see summary by the present writer at 20 Conv.(N.S.) 450.

(*p*) His rights are to call for a transfer, or for rectification of the register.

(*q*) L.R.A., ss. 54–56.

(*r*) L.R.R., Schedule.

therein." Alternatively a restriction might be entered requiring the consent of the beneficiary to any transaction (*s*).

The Chief Land Registrar states that where an instrument of transfer discloses that the transferee is a bare trustee he is prepared to register the transfer only on condition that a restriction protecting the beneficiary's interest is entered on the register.

(b) *Bare trust in registered land created by adverse possession*

As mentioned above, an adverse possessor has an overriding interest by section 70 (1) (f), and on his completion of the relevant period of adverse possession the registered proprietor holds on trust for him until rectification of the register (s. 75). Pending such rectification a caution or restriction could, no doubt, be entered.

(c) *Bare trust created by unregistered disposition of registered interest*

A transfer or other disposition of the registered estate in land must be completed by entry of the transferee on the register as proprietor; until this is done the transferor remains proprietor of the register estate, which passes only on registration of the disposition (*t*). Between execution of the transfer or other instrument and its registration the transferor apparently holds on trust for the transferee (*u*). During this period the transferee, if in possession, has, it is submitted, an overriding interest within section 70 (1) (*g*) of the Land Registration Act. Omission to register should be rare, but may occur. For example, on the granting of a lease the lessee must register to obtain the legal estate if the lessor's title is registered and the lease is for more than twenty-one years, and notice of the lease must also be entered on the lessor's title; similarly any lease for forty years or more in a compulsory area must be registered (*a*). The Land Registry Practice Note 24 (*b*) says "A lessee who has not protected himself in accordance with the foregoing provisions may nevertheless have an overriding interest under section 70 (1) (*g*) if in actual occupation of the land or in

(*s*) L.R.A., s. 58 (1) (b).

(*t*) L.R.A., ss. 18–20 (freeholds), 21–23 (leaseholds).

(*u*) K. & E., pp. 35, 158.

(*a*) L.R.A., ss. 18–23, 48, 123. The position regarding leases by registered proprietors was not fully appreciated for some years after 1925: see "Land Registration; The Problem of Leases," by F. R. R. Burford (1936) 1 Conv.(N.S.) 344.

(*b*) (1957) 21 Conv.(N.S.) 474, replacing Practice Note 10, (1954) 18 Conv.(N.S.) 75.

receipt of the rents and profits thereof." It is respectfully submitted that this suggestion is correct (*c*), and also that the principle must apply to prospective purchasers as well as to lessees. The eventual conversion of such an overriding interest into a registered interest would appear to constitute rectification of the register if effected against a subsequent purchaser for value (*d*). Whether any claim to compensation could be made is doubtful, for it was held in *Re Chowood* (*e*) that rectification to give effect to an overriding interest created by adverse possession did not entitle the registered proprietor to compensation.

Whether such a registrable unregistered disposition could be protected by caution or restriction also seems doubtful. The objection to giving any effect to an unregistered disposition either as an overriding or minor interest is that it might encourage "off the register" conveyancing (*f*). Such a practice would strike at the basis of registered conveyancing and would be discouraged by the Registry. The Chief Land Registrar writes:

> "The Registry would certainly refuse to register a purported disposition of registered land which was not made in the prescribed form, and where the register had been neglected so that there was a series of unregistered dispositions the Registry would insist upon the applicant obtaining a transfer by the person shown on the register to be the proprietor of the land. It might transpire, of course, that it was impossible to trace that proprietor or his personal representatives and in that case we might be prepared to rectify the title by registering the final purchaser but special fees would be charged amounting probably in sum to the total which would have been payable had all the intervening dispositions been registered."

It must be added, however, that the disadvantages incident to lack of the legal estate appear to be the principal deterrent to reliance on agreements for leases or contracts for sale instead of registered dispositions (*g*).

(*c*) Subject to the possible doubt about the effect of receipts of rents and profits: *ante*, p. 21.

(*d*) *Bridges* v. *Mees* [1957] Ch. 475.

(*e*) [1933] 1 Ch. 574; *contra* K. & E., pp. 291–292, where it is suggested that compensation would be granted on registration of an unregistered lease against a transferee.

(*f*) See K. & E., p. 51.

(*g*) Such a practice shows some signs of developing in unregistered conveyancing, presumably for financial reasons: see the Report of the Committee on Land Charges, Cmd. 9825, para. 15; see too *Rust* v. *Goodale* [1957] Ch. 33 *Williams* v. *Greatrex* [1957] 1 W.L.R. 19; [1956] 3 All E.R. 705. In registered conveyancing there may be a deterrent in s. 109 of the Act, providing that no dealings or dispositions shall take place off the register if they can be effected by

(5) Equitable licences

Brickdale and Stewart Wallace say "there appears to be no limit . . . to the smallness or remoteness of the interest in land which will enable a caution to be lodged" (*h*). If this is correct, any licensee can caution. On objection to the warning-off of the caution the Registrar would have to decide whether the licence was enforceable (*e.g.*, against a transferee of the land) or could refer the matter to the court (*i*). A licensee in occupation, including a deserted wife, would seem entitled to an overriding interest under section 70 (1) (g) of the Act. Of course this would not validate the licence against successors in title except to prevent any plea of "no notice." Thus, the deserted wife in occupation of registered land can, it is submitted, always ask the court to exercise its discretion to allow her to stay (*k*).

(6) Equitable easements and profits à prendre

Equitable easements and profits *à prendre* may be protected by notice or caution (*l*). At the same time the relevant paragraphs, section 70 (1) (a) and (j) do not appear to exclude equitable interests (*m*). Consequently, equitable easements and profits *à prendre* also appear to enjoy the dual character of minor or overriding interests according as they are or are not protected on the register.

(7) Other equitable interests in registered land

The only other paragraph in section 70 (1) which may cover equitable rights seems to be paragraph (h)—"In the case of a possessory, qualified or good leasehold title, all estates, rights, interests and powers excepted from the effect of registration." Here the Act, as in the case of the deserted wife's licence, will not give extra validity to an excepted equitable interest, but will only prevent

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registered disposition but the effect of this section is far from clear: see "Section 109 of the Land Registration Act, 1925; Its Scope and Sanction," by F. W. Taylor (1951) 15 Conv.(N.S.) 428.

(*h*) *The Land Registration Act, 1925*, 4th ed., p. 159.

(*i*) L.R.R., 220 (4).

(*k*) See "The Deserted Wife's Licence," by F. R. Crane (1955) 19 Conv.(N.S.) 343; "Licences to Remain on Land (Other than a Wife's Licence)," by R. H. Maudsley (1956) 20 Conv.(N.S.) 281.

(*l*) L.R.A., ss. 49, 54, 59; see (1953) 17 Conv.(N.S.) at pp. 122–123.

(*m*) s. 70 (1) (a): "Rights of common, drainage rights, customary rights (until extinguished), public rights, profits à prendre, rights of sheepwalk, rights of way, watercourses, rights of water, and other easements not being equitable easements required to be protected on the register." There is no such *requirement*. S. 70 (1) (j): "Rights of fishing and sporting, seigneurial and manorial rights of all descriptions (until extinguished) and franchises." See also K. & E., at pp. 46–48, 52–54.

a plea of "no notice" by a subsequent purchaser destroying whatever validity there was. Other equitable interests or mere equities, unsupported by possession, can only have the character of minor interests.

4. Derivative Equitable Interests in Registered Land

This section is concerned with interests created by assignments or other dealings of any kind with equitable interests in registered land, whether by outright transfer, charge or the creation of lesser interests, such as a sub-lease of an agreement for a lease (*n*). The Land Registration Act requires a distinction to be drawn at the outset between beneficial interests in settled land and other equitable interests.

(1) Dealings with equitable interests in settled land

The Act provides by section 102 (2) that "priorities as regards dealings effected after the commencement of this Act between assignees and incumbrancers of life interests, remainders, reversions and executory interests shall be regulated by the order of the priority inhibitions or cautions lodged" in the Minor Interests Index. In this special Index entries are made against the registered proprietor but do not affect his powers of disposition over the registered estate, for the Index does not form part of the Register (*o*). Registration in the Index takes the place of notice under the Law of Property Act, 1925, s. 137 (*p*). The category of beneficial interests cited above does not expressly enumerate all the interests which create settled land under the Settled Land Act, 1925, s. 1 (*e.g.*, entails and a fee simple subject to a family charge are omitted), but it is submitted that the subsection should be construed so as to include all beneficial interests in settled land. Section 102 also indirectly supports the submission made above (*q*) that beneficial interests in settled land cannot subsist as overriding interests but only as minor interests, for it would be illogical if the Minor Interests Index affected overriding interests.

It is convenient to consider here whether section 102 (2) applies to beneficial interests under trusts for sale. The editor of *Key and Elphinstone* points out that the wording quoted above is inappropriate to such interests (*r*), while the submission (*s*) that

(*n*) As in *Rust* v. *Goodale* [1957] Ch. 33.
(*o*) L.R.A., s. 102 (3); L.R.R., 11, 229.
(*p*) Applying and extending the rule in *Dearle* v. *Hall* (1823) 3 Russ. 1.
(*q*) *Ante*, p. 23.
(*r*) At pp. 79, 80.
(*s*) *Ante*, p. 20.

they may exist as either overriding or minor interests is also consonant with their falling outside the ambit of section 102. Though the matter cannot be free from doubt, it is submitted that the Minor Interests Index does not affect beneficial interests under trusts for sale.

(2) Dealings with equitable interests other than equitable interests in settled land

As was emphasised in the first section of this article, the Land Registration Act is primarily a conveyancing statute concerned with the registration and transfer of legal estates in land. Overriding and minor interests are treated simply as incumbrances on the title to the registered estate. Consequently, the general principle is that all dealings with equitable interests in registered land (except beneficial interests in settled land) are governed by the law of unregistered conveyancing, unless some provision of the Act or Rules happens to apply (*t*). It is also normally irrelevant whether the interest takes effect as an overriding or minor interest, for that question concerns only enforcement against the registered proprietor. A number of points may be made:—

(a) The Land Registration Act and Rules have no effect on the law controlling the form of the assignment, the assignee's rights against the assignor, or the question of priorities between assignees. All these matters depend on the law of unregistered conveyancing. Indeed, the Act provides (*u*) that priority between persons interested in minor interests shall not be affected by the lodgment of cautions or inhibitions. So, for example, priority between assignees depends either on notice to trustees under the Law of Property Act, 1925, if the equitable interest arises under a trust, or on priority of time if it does not (*a*).

(b) The protection given to the original equitable interest, whether as an overriding or a minor interest, against transferees from the registered proprietor must extend also to all assignees of that equitable interest. In *Rust* v. *Goodale* (*b*) the owner of

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(*t*) Of course the principle is not restricted to equitable interests. A legal lease for 21 years or less at a rent without a fine is in any event an overriding interest and the title cannot be registered (L.R.A., ss. 70 (1) (k), 8, 19, 22). Dealings with such a lease are entirely governed by the law of unregistered conveyancing; for example, a contract to assign such a lease would be registrable under the Land Charges Act, 1925, not the Land Registration Act, 1925.

(*u*) L.R.A., s. 102 (3); see also ss. 52, 56, 58, whereby notices, cautions and restrictions do not affect the validity of the interests protected. The Minor Interests Index is an exception to the rule.

(*a*) See "Equitable Interests in Land: Some Problems of Priority," by F. R. Crane (1956) 20 Conv.(N.S.) 444.

(*b*) [1957] Ch. 33.

an agreement for a lease in possession made a first and second charge thereof, and also "sub-let" part of the premises. So long as the registered proprietor, whether or not a transferee, held his title subject to the original agreement for a lease he would be subject also to the three derivative interests. Such derivative protection would, however, lapse, as against a subsequent transferee for value of the registered estate, if possession were given up, or protection on the register ceased. As regards the latter point, it should be pointed out that the Registry will not vacate a notice or restriction in these circumstances without proper conveyancing evidence of the applicant's right to call for its removal, including the production of any document (*c*). Thus, an assignee who took a transfer or first charge of an agreement for a lease would hold the actual agreement and so be able to prevent removal of the notice, but this advantage would not be enjoyed by persons taking a second charge or a sub-agreement (*d*). However, if the original equitable interest was protected only by a caution the position is different. On a proposed dealing with the registered estate the cautioner will be warned off, but if he takes no action the caution ceases (*e*). An assignee taking a complete assignment can cancel the assignor's caution and enter a new one in his own name (a caution is not transferable), while a chargee might be well advised to make such a change of cautioner a condition of his loan.

(c) It is also necessary to consider whether an assignee can obtain independent protection for his derivative interest, either as a minor or overriding interest.

(i) *As minor interests.* As already mentioned (*f*), Brickdale and Stewart Wallace say "there appears to be no limit . . . to the smallness or remoteness of the interest in land which will enable a caution to be registered" (*g*). The Chief Land Registrar, however, takes the view (*h*) that the Registry would be unlikely to accede to an application for an entry in respect of a derivative equitable interest, first, on the ground that "the title to the agreement for a lease is not a registered title and consequently there is no register on which dealings with that interest can be recorded," and second, if the original interest was protected,

(*c*) *Per* the Chief Land Registrar.
(*d*) As in *Rust* v. *Goodale*, *ante*.
(*e*) L.R.A., s. 55 (1).
(*f*) *Ante*, p. 27.
(*g*) *The Land Registration Act, 1925*, 4th ed., p. 159.
(*h*) Subject to the overriding proviso concerning special circumstances quoted at the beginning of this article: *ante*, p. 14.

in reliance on the proviso to section 54 (1) of the Act (*i*). This is to limit the interests that may be cautioned or otherwise protected to those enforceable directly against the legal title; the position is comparable to that existing where a registered lease is protected by notice on the lessor's registered title—dealings with that lease appear on its own title, not on the lessor's.

Though both views could be argued, the present practical position is, therefore, that derivative equitable interests can only be independently protected on the register if the Registrar can be satisfied that special and unusual circumstances make it necessary.

(ii) *As overriding interests.* Derivative equitable interests may confer actual possession of the land, as did the "sub-lease" of part of the premises in *Rust* v. *Goodale* (*k*), or may confer the right to receive rents and profits (*l*). It is submitted that section 70 (1) (g) of the Act is sufficiently widely drafted to include such interests, and that any question of the hierarchy of titles must be irrelevant. In such circumstances, therefore, derivative equitable interests may obtain independent protection.

5. Equitable Mortgages and Lessees

In unregistered conveyancing a lessee appears not to have notice of an equitable mortgage protected by a deposit of title deeds (*m*), though in *Rust* v. *Goodale* (*n*) this point did not validate, as against the mortgagee, a lease made by the mortgagor in contravention of limitations imposed by the mortgage on the statutory power (*o*). Where the title is registered this problem does not arise, for an equitable mortgage by deposit of the Land Certificate is protected by notice, and any other equitable charge by caution (*p*).

Any lessee must be bound by a mortgage so protected, or by an equitable mortgage constituting an overriding interest by virtue

(*i*) L.R.A., s. 54 (1), proviso: "Provided that a person whose estate, right, interest, or claim has been registered or protected by a notice or restriction shall not be entitled (except with the consent of the registrar) to lodge a caution in respect of such estate, right, interest, or claim . . ."; this proviso does not extend to entries in the Minor Interests Index.

(*k*) [1957] Ch. 33.

(*l*) See *ante*, p. 21.

(*m*) L.P.A., s. 44 (5); *Report of the Committee on Land Charges*, Cmd. 9825, para. 41; see (1956) 20 Conv.(N.S.), at pp. 450–451.

(*n*) [1957] Ch. 33.

(*o*) See (1956) 20 Conv.(N.S.) at pp. 450–451, where doubts were expressed about the decision in *Rust* v. *Goodale* on this point.

(*p*) *Supra*, p. 22.

of possession (*q*), because his lease is a disposition and so can only take effect subject to interests protected on the register and overriding interests (*r*). Consequently, any lease outside the statutory power (which may be restricted by the mortgage) will be void and the principle applied in *Rust* v. *Goodale*, *ante*, fully effective.

6. Summary

The propositions submitted in this article may be summarised as follows:—

(1) The distinction in unregistered conveyancing between legal and equitable incumbrances, so far as their effect against a transferee of the legal estate is concerned, has been replaced in registered conveyancing by the distinction between overriding and minor interests.

(2) Possession giving rise to overriding interests is very widely defined in the Land Registration Act, 1925, s. 70, and need not be of such a quality as would constitute notice in unregistered conveyancing.

(3) Equitable interests in registered land, other than beneficial interests in settled land, may subsist as overriding interests by virtue of possession.

(4) All equitable interests in registered land may in the alternative subsist as minor interests protected on the register, and their effect is then dependent on the nature of the entry on the register. Beneficial interests in settled land can subsist only in this way.

(5) The above principles extend to bare trusts, but bare trusts created by unregistered registrable dispositions cannot normally be protected by entries on the register.

(6) Assignees of equitable interests in registered land can rely upon the protection conferred on the assignor by the above principles; they can also claim separate overriding interests if in possession, but will not normally be able to make separate entries on the register.

(7) Except as regards settled land, the law concerning the assignment of equitable interests in land is unaffected by registration of the legal title.

(8) Equitable mortgages of registered land bind all subsequent lessees.

(*q*) An unlikely event: *ante*, p. 18.
(*r*) L.R.A., ss. 18–24.

WHEN IS AN OWNER NOT AN OWNER?

By J. F. Garner, ll.m., Solicitor

In modern—and ancient—legal theory in this country, the fee simple absolute in possession is the largest estate or interest known to the law, and the person entitled thereto may most accurately be described as "the owner" of the land, there being no competitor better qualified to that title. It is also said that ownership of land amounts to the best right to possession of the land (*a*), and it is generally argued by legal theorists that the owner of land (*i.e.*, the fee simple owner) can do what he likes with his own, subject only to the general law and the maxim *sic utere tuo ut alienam non laedas*. In modern times, of course, the "general law" has become so swollen with the many forms of control exercised under the authority of statute in the public interest by government departments, local authorities and public corporations, that this liberty of the owner has become quite unreal (*b*). However, it is not the object of this article to consider once again the many forms of public control over land, but rather to show how, as a consequence of the landowner's own acts, voluntarily entered into (sometimes, of course, under economic pressure), he, or his successors in title, may become so restricted in his freedom of action that his ownership in fee simple becomes almost valueless to him. We shall also consider the small measure of compensation that is allowed to him by the law in some of these circumstances.

Easements and Restrictive Covenants

An easement cannot be so widely drafted that it gives the exclusive or joint use of the servient tenement to the owner of the dominant tenement for all purposes (*c*), but the existence of an easement over the land which forms the servient tenement may well leave the owner thereof with very little freedom as to what he may do with the land. Thus, even the owner of land subject to as common an easement as a private right of way cannot build on it, or even plough it up (*d*), and the owner of a servient tenement

(*a*) See, *e.g.*, *The Law of Real Property*, by Megarry and Wade, at pp. 890 *et seq.*

(*b*) See *Public Control of Land*, by the present author.

(*c*) See article by the present author at (1953) 17 Conv.(n.s.) 398.

(*d*) Gale on *Easements*, 12th ed., at p. 448, and *Pomfret* v. *Ricroft* (1669) 1 Saund. 322a. In this matter of ploughing up, the servient owner is actually in a

subject to a right to place chicken coops thereon (*e*) will not be able to make any very beneficial use of the land while it remains so subject.

The doctrine of the enforceability of restrictive covenants imposed for the benefit of land retained by the covenantee and capable of benefiting that land is now well recognised in our legal system; such a covenant must, however, be restrictive of the user of the land if the burden thereof is to run with the land in equity. The nature of the restrictions that will be so recognised seems to be without limit, and they may go so far as:

To keep a garden "as it then was" (*f*);

Prohibiting alterations to a building (*g*);

Requiring premises not to be used otherwise than as a private dwelling-house (*h*); or

Prohibiting the carrying on of any trade or business (*i*).

Such rights *in alieno solo*, be they easements or restrictive covenants, may therefore have a very far-reaching effect on the extent to which the fee simple owner may enjoy the fruits of what may well seem a purely nominal ownership of the land.

Derogation from Grant

The restrictions that may be imposed through the well-known media of easements or restrictive covenants are, however, to some extent limited by the general rules to which easements (*k*) or restrictive covenants (*l*) must respectively conform. The restrictions that a landowner may impose on his own future use of his land—and that of his successors in title—as a consequence of the operation of the principle of "no derogation from grant," know no such limits, there being no rules with which such restrictions must comply in order that they may be recognised by the courts, provided that they are aimed at the physical use that may be made of the land. Thus, if a landowner sells, or leases (*m*), part of Blackacre for

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better position if his land is subject to a public right of way, for he may now plough up the way after giving seven days' notice to the local highway authority under s. 56 of the National Parks and Access to the Countryside Act, 1949.

(*e*) *Smith* v. *Gates* [1952] C.P.L. 814.

(*f*) This was the restriction in the famous case of *Tulk* v. *Moxhay* (1848) 2 Ph. 774.

(*g*) *Sharp* v. *Harrison* [1922] 1 Ch. 502.

(*h*) *Barton* v. *Keeble* [1928] Ch. 517.

(*i*) *Doe dem. Wetherell* v. *Bird* (1836) 2 A. & E. 161; *Lawrence* v. *South County Freeholds, Ltd.* [1939] Ch. 656.

(*k*) These were recently discussed in *Re Ellenborough Park* [1956] Ch. 131, itself a good example of the extent to which easements may restrict the user of land.

(*l*) See, *e.g.*, *Zetland* v. *Driver* [1939] Ch. 1.

(*m*) The principle applies equally to leases as it does to sales of freehold.

a specific purpose of which he is aware, he may not use the part he retains in such a manner as to prevent the part so disposed of from being used for that purpose. A parcel of land may have a natural right to support from the neighbouring land, but if a building is erected, the owner will normally have no right to support for that building from the adjoining land; "but if a landowner conveys one of two closes to another, he cannot afterwards do anything to derogate from his grant; and if the conveyance is made for the express purpose of having buildings erected upon the land so granted, a contract is implied on the part of the grantor to do nothing to prevent the land from being used for the purpose for which to the knowledge of the grantor the conveyance is made" (*n*). No easement to a right of air can be acquired by grant or prescription unless the air flows through a defined channel, but where a landowner has sold off part of his land for the purpose of stacking timber thereon, it was held that his successor in title could not erect a building on the land retained which would have the effect of interrupting the access of air to sheds on the land so sold off, which were used for drying the timber, as this would amount to a derogation from the original grant (*o*). Similarly, a landowner was prevented from building on the land retained where it would make it difficult to obtain a licence under the Explosives Acts for the erection of an explosives magazine on the land sold off, this having been the purpose of the purchase (*p*). On the other hand, the principle can be applied only to prevent particular uses of the land retained which would adversely affect the user of the land sold off: "I should be extending the application of the principle into a region quite different from that in which it has hitherto been applied if I were to hold that it applied to anything done by a lessor upon adjoining land which, while not otherwise affecting the demised premises or their user in any way, merely made it more expensive than it was before for the lessee to carry on his business on the demised premises" (*q*). Further, "It is quite reasonable for a purchaser to assume that a vendor who sells land for a particular purpose will not do anything to prevent its being used for that purpose, but it would be utterly unreasonable to assume that the vendor was undertaking restrictive obligations which would prevent his using land retained by him for any lawful

(*n*) *North Eastern Ry.* v. *Elliot* (1860) 1 J. & H. 145, *per* Wood V.C., at p. 153.

(*o*) *Aldin* v. *Latimer Clark Muirhead & Co.* [1894] 2 Ch. 437; and see also *Cable* v. *Bryant* [1908] 1 Ch. 259.

(*p*) *Harmer* v. *Jumbil (Nigeria) Tin Areas, Ltd.* [1921] 1 Ch. 200.

(*q*) *Per* Branson J. in *O'Cedar, Ltd.* v. *Slough Trading Co.* [1927] 2 K.B. 123, at p. 129.

purpose whatsoever merely because his so doing might affect the amenities of the property he had sold" (*r*). When applying the principle, one must "look at the surrounding circumstances to help [one] ascertain what the grant in fact was" (*s*).

Land Devoted to a Specific Purpose

In two sets of circumstances, land may be devoted in law to a particular purpose or purposes, and so the owner may be very considerably restricted in his powers to do what he likes with his own. In the first place, when land is vested by statute in a public authority for a specified purpose, they will normally have, subject to any specific provision in the enabling statute, no power to deal with that land in any manner incompatible with the specified purpose. This is the principle of *R.* v. *Inhabitants of Leake* (*t*), wherein Parke J. said, "If the land were vested by Act of Parliament in commissioners so that they were thereby bound to use it for some special purpose, incompatible with its use as a highway, I should have thought that such trustees would have been incapable in point of law to make a dedication of it; but if such use by the public be not incompatible with the objects prescribed by the Act, then I think it clear that the commissioners have that power. The mere circumstances of their not being beneficial owners (*u*), cannot preclude them from giving the public this right." This principle was applied recently, in *British Transport Commission* v. *Westmorland County Council* (*a*), when it was held that the Commission and their statutory predecessors in title, the railway company, could not be said to have no power to dedicate as a highway a footbridge over their railway lines, as such a public right was not incompatible with the purpose for which the land was originally acquired, namely, for the operation of the railway. It was recognised that a railway company, "which operates under statutory powers of managing its railway conferred on it for the furtherance of the public interest," has not, generally speaking, the full capacity of disposition enjoyed by a private owner of land—but this principle is not so wide as to exclude the power to grant an easement, as distinct from an outright alienation of the land (*b*). The case is really confined to its own context of the powers of the

(*r*) *Browne* v. *Flower* [1911] 1 Ch. 219, *per* Parker J., at p. 227.
(*s*) *Harmer* v. *Jumbil, etc.* (*supra*), *per* Lord Sterndale M.R., at p. 217.
(*t*) (1833) 5 B. & Ad. 469.
(*u*) This does not mean in the conveyancing sense of owners in fee simple.
(*a*) [1957] 2 W.L.R. 1032; [1957] 2 All E.R. 353 (H.L.).
(*b*) See the speech of Lord Radcliffe, from which the quotation is taken, wherein the view is expressed that *Mulliner* v. *Midland Ry.* (1879) 11 Ch.D. 611, was wrongly decided.

British Transport Commission, but it is also reasonably clear that a public authority may be restrained from using land acquired for a specific purpose, for any other purpose without statutory authority (*c*). Under section 163 of the Local Government Act, 1933, any local authority may, with the consent of the Minister of Housing and Local Government, appropriate any land belonging to them and not required for the purposes for which it was acquired, for any other purpose for which they are authorised to acquire land (*d*); the corporate land of a local authority (*e*) may be used for any purpose (*f*), but even in this case a power is given to sell the land subject to the consent of the Minister of Housing and Local Government (*g*), and therefore, presumably, such land cannot be sold without that consent (*h*).

In addition, land may become subject to use for a particular and specific purpose, as the result of an act *inter partes*, and quite apart from any statutory authority. Total restraints on alienation are said to be void (*i*), either because such a restraint is repugnant to the nature of the interest conveyed, or on the grounds of public policy (*k*), and there is also a well-known rule against "perpetual trusts." Charitable trusts are not subject to the latter rule, but in the leading case of *Carne* v. *Long* (*l*) a testator gave his freehold house at Penzance to the trustees for the time being of the Penzance Public Library (a subscription library not vested in the local authority, this taking place long before the passing of the Public Libraries Acts), to hold to them and their successors for ever, for the use, benefit, maintenance and support of the library. The gift was treated as being one for "the benefit of a society of individuals in Penzance" (*m*), and therefore no question of a charitable intention arose; it was held to be a gift which "tended to a perpetuity,"

(*c*) See, *e.g.*, *Att.-Gen.* v. *Hanwell U. D. C.* [1900] 2 Ch. 377.

(*d*) Any such appropriation will, however, be subject to "any covenant or restriction affecting the use of the land in their hands": Local Government Act, 1933, s. 163 (1), proviso (ii); but contrast the similar power given by s. 42 of the Town and Country Planning Act, 1947, which section does not contain a similar provision.

(*e*) *i.e.*, "land held by a municipal corporation otherwise than for an express statutory purpose": Local Government Act, 1933, s. 305. Only the borough councils can own "corporate land."

(*f*) It can be argued that a municipal corporation have all the powers of a natural person in law, except in so far as those powers may have been cut down by statute—see, *e.g.*, *Att.-Gen.* v. *Leicester Corporation* [1943] Ch. 86.

(*g*) Local Government Act, 1933, s. 172 (3).

(*h*) *Expressio unius est exclusio alterius.*

(*i*) "For it is absurd and repugnant to reason that he, that hath no possibility to have the land revert to him, should restrain his feoffee in fee simple of all his power to alien": Co.Litt. 223a.

(*k*) As was argued by Professor Glanville Williams at (1943) 59 L.Q.R. 343; and see (1954) 70 L.Q.R. 15.

(*l*) (1860) 2 De G.F. & J. 75.

(*m*) *Per* Lord Campbell L.C., at p. 80.

and therefore the devise was held to be invalid. In *Re Dalziel* (*n*), a gift to a hospital subject to the condition that the governors should maintain the testatrix's family mausoleum, was held void for perpetuity, there being no gift over to charity, and in *Re Turkington* (*o*), a gift to trustees in order to build a new masonic temple was called into question, but held by the court to be a valid gift and not void for perpetuity when it was shown that the trustees had power under the will to dispose of the money how they wished. On the other hand, in the famous case of *Re Chardon* (*p*), a testator gave £200 to trustees to apply the income to maintain two graves, with gifts over to charity in default, and this was held to be a valid gift. This case may be explained on the basis that the capital could have been disposed of; there was no question of tying up both capital and income indefinitely.

Nevertheless, a gift or a devise to a local authority or other public body for a public purpose is probably not a charitable trust (*q*), but the gift for any such specific purpose would nonethe-less appear to be valid and the local authority will be restricted to the terms of the gift in exercising their rights of ownership (*r*). If prescribed by the Lord Chancellor under section 3 of the Law of Property (Amendment) Act, 1926, the local authority may, in respect of such a public trust, become a "trust corporation," and so acquire the powers of such a body under the Law of Property Act, 1925, Settled Land Act, 1925, etc. (*s*). If the conveyance of the land to the local authority provides in the habendum that the land is to be held for a specific purpose, it seems that a reverter to the grantor will arise when the land ceases to be used for that purpose, and the reverter may not be overriden under the authority of an appropriation to some other purpose, even if duly effected with the consent of the Minister under the terms of the Local Government Act, 1933 (*t*).

(*n*) [1943] Ch. 277; [1943] 2 All E.R. 656.

(*o*) [1937] 4 All E.R. 501.

(*p*) [1928] Ch. 464.

(*q*) "Public purposes" *per se* are not necessarily charitable: *Houston* v. *Burns* [1924] A.C. 262; *Re Eades* [1920] 2 Ch. 353; *Re Diplock* [1941] Ch. 253; [1941] 1 All E.R. 193. On the other hand, a gift for a specific public purpose (*e.g.*, for the benefit of the aged) may be charitable: *Re Cottams* [1955] 1 W.L.R. 1299; [1955] 3 All E.R. 704.

(*r*) That such gifts must be valid appears from references to them in such sections as 55 and 56 of the Settled Land Act, 1925, and s. 34 (3) (a) of the Trustee Act, 1925.

(*s*) Land so vested in a local authority as trustees on or for a public trust is deemed to be settled land, and so they have a power of sale thereof: Settled Land Act, 1925, s. 29.

(*t*) Appropriations are subject to "any covenant or restriction affecting the use of the land": L.G.A., 1933, s. 163 (1), proviso (ii). The reverter may, however, be overridden by a sale under s. 29 of the Settled Land Act, 1925.

It is now proposed to consider what advantage is recognised by the law for owners of land so restricted in their ownership in manner before discussed.

"Struck with Sterility"

When a public park is vested in a local authority for the perpetual use of the public, it seems that the authority will not be liable to pay rates in respect thereof. This general principle was established by the well-known *Brockwell Park* case (*u*), where the London County Council had purchased a park by agreement, under statutory powers which required the authority to hold the premises "as a park and [to] lay out and maintain and preserve it as a park for the perpetual use thereof by the public for exercise and recreation." The House of Lords held that the "public" were not capable of being a rateable occupier, and that, therefore, the park was not subject to rating: "The fact that the park is vested in the county council does not make them the occupiers. It would be absurd to contend that wherever the legal estate is, there is occupation. A road is vested in someone, but in a public road, there is no occupation of it any more than of a milestone or a direction post. . . . I think there is no occupation at all, the county council being merely custodians and trustees for the public" (*per* Lord Halsbury L.C.). In the recent case of *Sheffield Corporation* v. *Tranter* (*a*), the Court of Appeal had to consider the rating position of a park in Sheffield which had been acquired by means of a deed entered into under section 164 of the Public Health Act, 1875, under the terms of which the city corporation were bound to permit the park to be used for ever thereafter as public walks and pleasure grounds, and it was agreed that the park should be treated as being of a character in all relevant respects similar to Brockwell Park in the earlier case. In the *Sheffield* case, however, the claim for exemption from rating related to a refreshment pavilion situated within the park, let by the corporation to a tenant. In the judgment of Lord Evershed M.R. it was pointed out that the earlier cases (*b*) on this subject had decided that occupation by the public did not necessarily mean that the public must always be afforded free and unrestricted access to all parts of the park at all times, and, as was said by Morris L.J. (*c*), "the position remains the same, that the real occupiers of the park are

(*u*) *Lambeth Overseers* v. *London County Council* [1897] A.C. 625.
(*a*) [1957] 2 All E.R. 583.
(*b*) *Liverpool Corporation* v. *West Derby Assessment Committee* [1908] K.B. 647; *Burnell* v. *Downham Market U. D. C.* [1952] 2 Q.B. 55; [1952] 1 All E.R. 601.
(*c*) At page 593.

the public, and that in the circumstances of this case this pavilion ought not to be regarded as a kind of island hereditament with activities and purposes detached from those for which a public park exists. The corporation have, so to speak, delegated to the tenant certain activities which form a part of the function of managing the park for the benefit of the occupiers of the park, *i.e.*, the public." The Court of Appeal therefore held that the refreshment pavilion, being within the park, was not in rateable occupation.

This special exemption from liability to rating does not arise, however, where there is no statutory or other irrevocable dedication to the public. Thus, mere use by a local authority of a piece of land as a pleasure ground under section 164 of the Public Health Act, 1875, is insufficient to give exemption: "there must be some statutory or possibly some private (*d*) obligation such as a trust which is sufficiently irrevocable to give the public overriding rights which exhaust every possible value of the property" (*e*). In the *Redcar* case (*f*), it was pointed out (*g*) that a local authority using land as a public park under section 164 of the Public Health Act, 1875, can close the ground for a short period and let it out (Public Health Acts Amendment Act, 1890, s. 44 (1)), let out boats for hire on a lake in the ground (*ibid.*, s. 44 (2)), make provision for concerts and entertainments (Public Health Act, 1925, s. 56), and appropriate the land for some other purpose approved by the Minister of Housing and Local Government (Local Government Act, 1933, s. 163), etc. (*h*). In this case, the park and foreshore in question were used by the corporation not only to provide amenities for the public, but also so as to make a revenue towards the expenses incurred by the corporation, and therefore the corporation were held to be in rateable occupation thereof, although that occupation was not in a financial sense beneficial.

This principle, that when a parcel of land—a "hereditament" in a rating sense—is "struck with sterility" (*i*), and so is incapable

(*d*) It was said in *Hall* v. *Beckenham Corportion* [1949] 1 K.B. 716, that the terms of the Public Health Act, 1875, s. 164, were sufficient to amount to a perpetual dedication to the public, but this was not a rating case, and the remark was *obiter*. A specific trust created by a deed of conveyance for the purposes of the Open Spaces Act, 1906, was held to be sufficient for this purpose, in *Burnell* v. *Downham Market U. D. C.* (*ante*).

(*e*) See *London Playing Fields Society* v. *South West Essex Assessment Committee* (1930) 144 L.T. 233.

(*f*) *North Riding County Valuation Committee* v. *Redcar Corporation* [1942] 2 All E.R. 589.

(*g*) By Cassels J., at p. 596.

(*h*) See above, p. 37.

(*i*) An expression taken from the *London Playing Fields Society* case (*ante*).

of being used for any other than prescribed public purposes, is not excluded by reason of the landowning public authority being able, under statutory authority, to appropriate the land for other purposes, or even to dispose of it, but the principle does not seem to have been applied to private individuals; not even to the trustees of a private square, such as in the *Ellenborough Park* case (*k*).

Land "Extra Commercium"

A somewhat similar position arises in connection with the liability of a landowner to bear an apportioned share of the expenses incurred by the local authority in making up a private street to which his land has a frontage (*l*). If the particular piece of land is held to be *extra commercium*, the "owner" (*m*) will be freed from any liability to bear the proportion of the expenses apportioned to that piece (*n*); land is *extra commercium* for this purpose if it is such that it is incapable of having an owner under the appropriate Private Street Works legislation (*o*) (as, *e.g.*, in the case of a highway—a cross street), or if it is irrevocably dedicated in some way for the use of the public.

Thus, Tooting Bec Common in London was vested in the Wandsworth Borough Council for the use of the public, under statutory powers. It was held (*p*) that the part of the Common having a frontage to a private street being made up at the expense of the frontagers by the London County Council was *extra commercium*, and so not liable to any private street works charge: "It seems plain that land may be so dedicated to public purposes that it cannot be let at a rent at all, and in such a case it seems to follow, from the decision of the Exchequer Chamber in *Plumstead Board of Works* v. *British Land Co.* (*q*), that the persons in whom the legal title to such land was vested would not be owners within the meaning of the statute . . . the person vested with the property of heritable subjects which have been placed *extra commercium*,

(*k*) [1956] Ch. 131.

(*l*) Under the Private Street Works Act, 1892, Public Health Act, 1875, s. 150, or some local Act, as the case may be.

(*m*) In the conveyancing sense.

(*n*) There is a distinction between the procedures under the Private Street Works Act, 1892, and the Public Health Act, 1875, s. 150, respectively, on this point. Under the 1892 Act, any land which is *extra commercium* has to be brought into the apportionment, and the expenses so apportioned to that land will have to be borne by the highway authority; under the 1875 Act, however, land *extra commercium* cannot be brought into the apportionment, as owners only are charged, and *ex hypothesi* such a parcel of land has no owner, and so in such a case the liability of all the frontagers in the street will be increased *pro tanto*.

(*o*) See footnote (*l*), *ante*.

(*p*) In *London County Council* v. *Wandsworth Borough Council* [1903] 1 K.B. 797.

(*q*) (1875) L.R. 10 Q.B. 203.

or are subject in perpetuity to the burden of a public right which deprives him of their beneficial use, is not an owner of land within the meaning of the statute " (*r*). It is only in circumstances where the local authority or other " owner " can be said to be trustees for the public (*s*), that this special exemption has, until recently, been applied in benefit of any particular parcel of land. In *Herne Bay U. D. C.* v. *Payne and Wood* (*t*), the local authority had purchased certain land which had a frontage to the private street that was being made up, for the purposes of a public pleasure ground under section 164 of the Public Health Act, 1875, and in the conveyance to them they had covenanted to keep the land open as a recreation and pleasure ground for the use of the public for ever. It was held that although this property had no owner, and was therefore *extra commercium*, the land had to be included in the provisional apportionment, and therefore the local authority would have to bear the share of the private street works expenses apportioned thereto, but in their capacity as highway authority, and not as owners of the land (*u*).

In the recent case of *Brighton Corporation* v. *Peachy (Investments), Ltd.* (*a*), it seemed to be taken for granted that a parcel of land which was in private ownership was *extra commercium* within the sense now discussed, because it was subject to a condition in a planning permission obtained by the owners to the effect that it should be preserved as an open space. Although the point of the status of the land as *extra commercium* was not discussed or decided in the Divisional Court, it seems rather strange if such land is in fact so to be regarded. Apart altogether from the possibility of the planning restriction being subsequently withdrawn or modified, preservation as an open space does not necessarily mean that the land is to be used for the benefit of the public; use as allotments or as a private sports ground would still comply with such a restriction. If the effect of the previous decisions is to be widened in this manner, the " public " element will be lost, and the private square of Ellenborough Park at Weston-super-Mare (*b*) will also be *extra commercium*.

(*r*) See the *Wandsworth* case, *per* Vaughan Williams L.J. and see also *G. E. R. Co.* v. *Hackney Board of Works* (1893) 48 J.P. 52.

(*s*) This expression (also taken from the *Wandsworth* case) does not really help very much, as in one sense a local authority may be said to be trustees for their ratepayers of all the property vested in them.

(*t*) [1907] 2 K.B. 130.

(*u*) But contrast the position under the Public Health Act, 1875, s. 150, footnote (*n*), *ante*.

(*a*) [1957] J.P.L. 586.

(*b*) [1956] Ch. 131.

In fact the whole notion of land being *extra commercium*—incapable of having an owner because by reason of restrictions on its use no one will accept a tenancy thereof at a rack rent—is somewhat strange and unreal. When is it possible to say with any certainty that a piece of land is "valueless"?—after all, there may be a prehistoric boat (*c*) or a valuable ring (*d*) lying unrecognised under the surface!

General Observations

Ownership is thus not all that it may appear to be; and where the freedom of the owner is restricted in one or other of the ways herein discussed, the law gives him only the very limited and special privileges of freedom from liability to rates and/or private street works expenses—in the particular circumstances where these apply. Even land subject to trusts for the benefit of the public is subject to Schedule A income tax, and the other normal outgoings, such as land tax and tithe redemption annuity, may be payable. In the case of land subject to a "public trust," the local authority owner may be able to appropriate the land for some other purpose, and any owner of land so subject may be prescribed as a trust corporation and the land will then be capable of being disposed of as settled land, subject to any Ministerial consents that may be necessary in any particular case. The special privileges mentioned will not, however, be lost by reason of these special powers (*e*).

(*c*) *Elwes* v. *Brigg Gas Co.* (1886) 33 Ch.D. 562.
(*d*) *South Staffordshire Waterworks Co.* v. *Sharman* [1896] 2 Q.B. 44.
(*e*) Although "sterility" in perpetuity was stressed in the *London Playing Fields Society* case, it is submitted that this is not supported by the other cases on the subject.

TACKING FURTHER ADVANCES

By R. Geoffrey Rowley, ll.d., Solicitor

Section 94 of the Law of Property Act, 1925, conferring a statutory right to tack certain further advances, is of considerable importance to the conveyancer, and is widely relied on in commercial transactions. It has not, however, yet been the subject of judicial construction, or even of any comprehensive literary interpretation. Whatever the reason for this lack of illumination may be, it is not that the framers of the 1925 legislation have with unwonted clarity resolved all possible doubts. Indeed, they appear rather to have confounded confusion, and the writer ventures only to submit a tentative construction of the section and to suggest its practical effects.

Although the draftsmen have, by section 94 (3), swept away the intricacies of the pre-existing forms of tacking (*a*), they have retained in subsection (1) a hybrid statutory right to tack which cannot be studied without reference to its heredity and environment. This can be the only excuse for recalling from limbo the pre-1926 law of tacking.

Tacking Before 1926

Prior to 1926 there were two distinct types of tacking:

(1) *Tacking by virtue of the legal estate.* A legal mortgagee could tack subsequent advances made at a time when he had no notice of an intermediate mortgage. Further, an equitable mortgagee, who had at the date of his mortgage no notice of a prior equitable mortgage, could buy in the legal estate of the first legal mortgagee and so squeeze out the intermediate equitable mortgage: this was known as the *tabula in naufragio*. Both these forms of tacking were applications of the rule that a mortgagee who had the legal estate should prevail over all other mortgagees of whose security he had no notice when he made his advance, and the right to tack applied whether or not the legal mortgage was made to secure further advances.

(*a*) Tacking was abolished by the Vendor and Purchaser Act, 1874, s. 7, but restored by the Land Transfer Act, 1875, s. 129.

(2) *Tacking by virtue of contract.* Where a mortgage, legal or equitable, was drawn to secure further advances, the mortgagee could tack further advances, subject to the following limitation: "A first mortgagee, whose mortgage is taken to cover what is then due to him and also further advances, cannot claim the benefit of his security for further advances in priority to a second mortgagee of whose mortgage he had notice before his further advances were made" (*b*).

Hopkinson v. Rolt (*c*)

The facts of this case, in which the limitation of the contractual right to tack was established, are instructive: M entered into three successive mortgages—a first legal mortgage to secure £45,000; a second equitable mortgage to a bank to secure the balance of a current account up to £20,000; and a third mortgage also to secure a current account in favour of Rolt. It was held that the bank's mortgage "secured further advances to the amount of £20,000 absolutely, till there should be notice of a second mortgage, and continuously as between mortgagor and mortgagee, although there should be a second mortgage," *i.e.*, that after notice of Rolt's mortgage, the alternating priorities between advances on current account under the two mortgages should be adjusted according to the order in which they were made. Lord Cranworth observed that "Mortgages are but contracts; and when once the rights of parties under them are defined and understood, it is impossible to say that any rule regulating their priority is unjust." This defence to any charge of injustice arising from contractual tacking is certainly justified (*d*): a second mortgagee has notice of the existence, and thereby of the contents, of the first mortgage, and if the first mortgagee is expressly authorised to tack further advances, the second mortgagee should inquire whether he has already done so before advancing on second mortgage. It might appear, however, that the contractual nature of a mortgage was obscured in *West* v. *Williams* (*e*), where it was held that a covenant to make further advances did not enable a prior mortgagee to tack those further advances against a subsequent mortgagee of whom he had notice.

(*b*) *Per* Lindley M.R. in *West* v. *Williams* [1899] 1 Ch. 132.

(*c*) (1861) 9 H.L.Cas. 514.

(*d*) Though it may be doubted whether it is applicable in a case prior to which the rights were not "defined or understood." Lord Cranworth's was a dissenting opinion.

(*e*) [1899] 1 Ch. 132.

Consolidation

The law of consolidation is closely allied to, and has closely followed, the law of tacking. A mortgage advance on Whiteacre, which the mortgagee is entitled to consolidate with a previous advance on Blackacre, is in itself a further advance on the security of Blackacre, and "the equities cannot be altered by the fact that the mortgagee, when making further advances, stipulated for further security" (*f*).

It was established by the House of Lords in *Jennings* v. *Jordan* (*g*) that the equity to consolidate future mortgages is lost by an assignment (including an assignment by way of second mortgage) of the equity of redemption.

Just as, prior to *Hopkinson* v. *Rolt*, the courts had held (*h*) that a puisne mortgagee with notice of an express right to tack further advances must take subject to that right, so it was held in *Andrews* v. *City Permanent Benefit Building Society* (*i*) that a prior mortgagee with an express (as distinct from an equitable) right of consolidation can consolidate against a subsequent mortgagee of whom he has notice. This distinction was dispensed with in *Hughes* v. *Britannia Permanent Benefit Building Society* (*k*), where Kekewich J. followed *Hopkinson* v. *Rolt*, and held that a mortgagee, with an express right to consolidate future mortgages, could not do so against a subsequent mortgagee of whose charge he had notice before entering into the future mortgages. This later decision appears to be more in accordance with the whole trend of authority.

TACKING AFTER 1925

Section 94 (1)

The conversion of mortgage securities into terms of years, with the result that any number of legal mortgages on the same property can co-exist, led to a considerable modification of the prevalence hitherto accorded to the legal mortgage, and made it possible to abolish the distinction as to tacking formerly made between legal and equitable mortgages. Accordingly, by virtue of subsection (1), a prior mortgagee, whether legal or equitable, and "whether or not the prior mortgage was made expressly for securing further advances," has a right to make further advances to rank in priority to subsequent mortgages, whether legal or equitable, in three cases only:

(*f*) *Hughes* v. *Britannia P.B.B.S.* [1906] 2 Ch. 606, *per* Kekewich J.
(*g*) (1881) 6 App.Cas. 698.
(*h*) *Gordon* v. *Graham* (1716) 2 Eq.Cas.Abr. 598.
(*i*) (1881) 44 L.T. 641.
(*k*) [1906] 2 Ch. 606.

(a) "if an arrangement has been made to that effect with the subsequent mortgagees." This appears to have inserted *ex cautela*, in a fit of pellucidity rare in real property legislation, to make it abundantly clear that the abolition of pre-existing forms of tacking contained in subsection (3) does not preclude arrangements to postpone securities.

(b) "if he had no notice of such subsequent mortgages at the time when the further advance was made by him." For this purpose, subject to the provisions of subsection (2), registration of a subsequent mortgage in a local deeds register, or as a puisne mortgage or general equitable charge in the land charges register, is by virtue of the Law of Property Act, 1925, ss. 197 and 198, deemed to constitute actual notice.

(c) "whether or not he had such notice as aforesaid, where the mortgage imposes an obligation on him to make such further advances." This reverses the decision in *West* v. *Williams*, and affords security to the usual type of building advance. A mere retention of part of a mortgage advance pending completion of streets or repairs cannot be advanced with any security under this head, unless there is a definite obligation to make it, but such an obligation may be made conditional on the receipt of a satisfactory surveyor's report.

Section 94 (2) (The Bankers' Clause)

The provision (*l*) that registration under the Land Charges Act, 1925, is equivalent to notice "to all persons and for all purposes connected with the land affected" is so sweeping that, where tacking was concerned, it was found necessary to limit it to cases where there is at least an opportunity of making the necessary searches to find out what one is deemed to know. Where there is a mortgage to a bank to secure a current account, and the meeting of each cheque constitutes a fresh "further advance," it is clearly impracticable for the bank to search before making every advance. It was therefore provided by subsection (2) that "where the prior mortgage was made expressly for securing a current account or other further advances . . . a mortgagee shall not be deemed to have notice of a mortgage merely by reason that it was registered as a land charge or in a local deeds registry, if it was not so registered at the time when the original mortgage was created or when the last search (if any) by or on behalf of the mortgagee was made, whichever last happened."

(*l*) L.P.A., 1925, s. 198 (1). This operates without prejudice to the provisions of the Act respecting the making of further advances by a mortgagee—subs. (2).

The provision, reminiscent of the Nelson touch, that the prior mortgagee shall be deemed to have notice if a subsequent mortgage was registered "when the last search (if any) by or on behalf of the mortgagee was made" is curious, since priority is made dependent upon information which will not normally be available to a subsequent mortgagee.

The protection of the subsection extends only to mortgages "made expressly for securing a current account or other further advances" (which in the interests of brevity but not of accuracy will be referred to as "current account mortgages") and each constituent of this definition merits consideration.

"Made Expressly"

As will be seen, prior to 1926 certain mortgages were, as between mortgagor and mortgagee, held to be impliedly made to secure a current account, although it seems clear that they would not thereby be enabled to tack against a subsequent mortgagee, who would have no notice of the implication. The mortgage should be expressly, as distinct from impliedly, made to secure further advances, so that a subsequent mortgagee will have notice of the contractual stipulation. "Expressly" does not mean "literally," although clearly it is an advantage to recite unambiguously that the mortgage is intended to secure a current account or other further advances. So long as a subsequent mortgagee can infer, from the terms of the prior mortgage and without extraneous evidence, that it was intended to stand as a continuing security, the "expression" will be adequate. Whether the mere incorporation of the rules of a building society, which authorise the making of readvances, will be sufficient to bring a building society within the "bankers' clause" may be doubted (*m*). A subsequent mortgagee may be affixed with constructive notice of the rules incorporated in the mortgage (*n*), but it is thought that to gain the protection of the bankers' clause the "expression" of the nature of the security must be in the mortgage deed itself and not in other documents.

"For Securing a Current Account"

It is unfortunate that subsection (1) should refer to "further advances" in general and subsection (2) to current accounts in particular. No doubt the reference to current accounts was made to reassure banks that their normal form of mortgage was covered,

(*m*) A similar problem may arise as to whether the incorporation of a building society's rules, which provide for consolidation of mortgages, is a sufficient expression of a contrary intention to exclude the L.P.A., 1925, s. 93.

(*n*) *Andrews* v. *City P.B.B.S.* (1881) 44 L.T. 641.

but it should be noted that the subsection is not in terms limited to bank mortgages, as is a similar provision in the Agricultural Credits Act, 1928, s. 9 (8), which incorporates a proviso similar to the bankers' clause " where an agricultural charge created in favour of a bank is expressly made for securing a current account or other further advances." There seems to be no reason why a private individual should not make advances on a current account (*o*), but a building society is in a more limited position as a body operating under its own statutes. It has no power to carry on a banking business (*p*) and its loans are represented by advanced shares repayable by subscriptions in accordance with the rules, and are not " current accounts " in any accepted sense of the term. It is accordingly thought that building society mortgages should not be expressed as being made to secure a current account.

" Or Other Further Advances "

The learned editor of Emmet on *Title* (*q*) states that these words " are evidently not intended to apply to the ordinary case where one person lends money to another on security of mortgage by way of investment " and calls in aid the *ejusdem generis* rule. It is difficult to see what further advances are of the same genus as a current account. Emmet suggests an advance to a builder by instalments as a building progresses, though one would normally expect to find a covenant to make further advances in such a case. It is significant that the Land Registration Act, 1925, s. 30 (1), provides that " When a registered charge is made for securing further advances," the registrar must give notice before making any entry which would prejudicially affect the priority of any further advance. An application of the *ejusdem generis* rule to the bankers' clause would result in different laws of tacking for registered and unregistered land, with corresponding complications where land under registered and unregistered titles is comprised in one mortgage.

It is submitted that there is no warrant in the wording of section 94 as a whole for adopting a restrictive interpretation of the words " other further advances," and that the correct view is that propounded by the editors of Fisher and Lightwood's *Law of Mortgage* (*r*): " A mortgage ' made expressly for securing a current account or other further advances ' appears to refer to the account or advance as authorised by the mortgage."

(*o*) As was in fact done in *Hopkinson* v. *Rolt* (1861) 9 H.L.Cas. 514; and *Andrews* v. *City P.B.B.S.* (1881) 44 L.T. 641.
(*p*) *Re Birkbeck P.B.B.S.* [1912] 2 Ch. 183.
(*q*) 14th ed., Vol. 2, p. 277.
(*r*) 7th ed., p. 510, note (*u*).

Whilst it has been suggested that a building society mortgage should not be expressed as securing a current account, there is nothing to prevent building societies from taking advantage of the bankers' clause by virtue of securing "other further advances." Wurtzburg's *Building Society Law* (*s*) states "that a Society whose mortgage form is so drafted as to embrace further advances, may safely make such advances without searching on each occasion, so long as it is not otherwise affected by notice of a subsequent incumbrance." There is nothing in the nature of a building society which makes it *ultra vires* to make readvances (power to do so is normally reserved by the rules) or further advances (this being part of the business of the society), but the society should ensure that all necessary formalities with regard to the issue or exchange of advanced shares are dealt with, and the mortgage should contain express reference to the fact that further advances are secured (*t*).

Types of Further Advance

Although section 94 refers generally to "further advances," it is found in practice that there are three types of further advance which must be differentiated, as they have different legal incidents.

(a) *Further Charges.* Further advances cannot be made in excess of the principal sum for which the mortgage is drawn (or, in the case of a current account mortgage, in excess of any limit laid down in such mortgage) without further security being obtained by means of a further charge (*u*). "Tacking" and section 94 are irrelevant to a consideration of further charges, by virtue of the grafting of a system of registration onto the doctrine of notice. Under this system notice, or the absence of notice, becomes a legal fiction. If a subsequent mortgage is registered, the prior mortgagee is deemed to have notice of it (*a*) and so cannot tack. If it is not registered, it is void (*b*) against a "purchaser" (including a mortgagee), who is not to be prejudicially

(*s*) 10th ed., pp. 100–101.

(*t*) A building society should be particularly careful about further advances, being precluded by the Building Societies Act, 1894, s. 13 (1), from advancing otherwise on the security of a first mortgage.

(*u*) A form is contained in the L.P.A., 1925, Sched. V, Form 2, which includes a charge by way of legal mortgage.

(*a*) By virtue of L.P.A., 1925, ss. 197 and 198. These sections apply only to instruments required or authorised to be registered. In this connection it is difficult to follow the observations (*obiter*) of Harman J. in *Rust* v. *Goodale* [1957] 1 Ch. 33, at p. 40, where it is suggested that an underlessee had notice, by virtue of its registration as a puisne mortgage, of a mortgage (expressed to be a legal charge) where the mortgagor admittedly had only an equitable estate.

(*b*) By virtue of L.C.A., 1925, s. 13 (2). "Purchaser" is defined in s. 20 (8).

affected by actual notice of it (*c*), so the mortgagee does not need to tack (*d*).

(b) *Bankers' clause advances.* These are further advances on the security of a current account mortgage up to the limit (if any) specified in the mortgage, and are not necessarily evidenced by anything more than a receipt or cheque, but unless the mortgage specifies clearly what advances are covered, the mortgagee should obtain a receipt indicating that the further advance is made on the security of the mortgage, to avoid any suggestion that it is an independent unsecured loan.

Although an unregistered puisne mortgage is void against a subsequent further charge, it is not necessarily void against further advances on the security of a current account mortgage. A further charge is a new security, a charge by way of legal mortgage to secure further advances. A current account mortgage is a collateral security for future debts created by parol and not under the deed (*e*). Under the old "legal estate" form of tacking, a further advance created a fresh charge; under "contractual" tacking there is only one charge securing further advances, and each further advance does not create a fresh charge. A mortgagee advancing on a current account after a subsequent mortgage is not therefore a "purchaser of the land charged" (*f*) against whom an unregistered mortgage is void, since there is no creation of a new interest in land to give rise to a "purchase." The non-registration of a puisne mortgage will not therefore postpone it to the further advance on current account if actual notice has been given to the prior mortgagee. The practical effects of this will be minimal, for it must be rare indeed that a puisne mortgagee who

(*c*) L.P.A., 1925, s. 199 (1). These provisions also defeat any resort to the *tabula in naufragio*, independently of its abolition.

(*d*) In theory tacking could still arise where a further charge is supplemental to a registered equitable mortgage, and there is an intermediate mortgage secured by a deposit of the title deeds and so not registrable; but in practice the prior equitable mortgagee having allowed a subsequent incumbrancer to obtain possession of the title deeds would be debarred from claiming priority for his further charge—see L.P.A., 1925, s. 13, expressly reserving all rights arising from possession of the title deeds.

(*e*) See *Barclays Bank, Ltd.* v. *Beck* [1952] 2 Q.B. 47, *per* Denning L.J.: "A future debt on a running account is a debt created by parol and it remains a simple contract debt even though the customer has previously given a charge to secure it which creates a covenant under seal. The future debt on a running account is not created under the deed . . . the deed is collateral security for its repayment."

(*f*) "Purchaser" means any person (including a mortgagee) who for valuable consideration takes any interest in land or in a charge on land: L.C.A., 1925, s. 20 (8). An interest in land cannot be created by parol: L.P.A., 1925, s. 53.

gives notice to a prior mortgagee fails to register his security as a land charge.

(c) *Readvances.* The third type of further advance, virtually ignored by textbooks but very common in practice, is the readvance. Where the mortgage is executed for a specific principal sum, part of which is repaid later, the mortgagee may in certain cases readvance the amount of the repayment to the mortgagor on the security of the original mortgage. Such cases are found chiefly, but not exclusively, in connection with building society mortgages.

Prior to 1926, readvances could clearly be tacked if the mortgage was expressly drawn to secure further advances, but they could also be charged to the mortgage security as against the mortgagor if the mortgage was impliedly to secure further advances. Evidence could be admitted that a security drawn for a fixed amount was in fact intended to secure a current account (*g*), and there are suggestions that evidence may be admitted of the conduct of the parties, even after the execution of the document, to show that intention (*h*). It is thought, although there is no authority in point, that a subsequent mortgagee would not be postponed to such readvances, since he would have no notice of the implied contractual term providing for further advances (*i*).

Section 94 deals only with the question of tacking against mesne incumbrancers; it does not enable a mortgagee to charge a personal loan to his mortgage debt, nor does it dispense with the requirement that the advance to be tacked must be incurred on the credit of the mortgaged property. In other words, the further advances to which the section refers are further advances on the security of the mortgage.

After 1925 a mortgagee can tack readvances if the mortgage is expressed to secure further advances, and in such a case registration will not constitute actual notice. Where the mortgage is in fact intended to secure further advances but is not expressed to do so, evidence will still be admitted of the intention of the parties. Where rules authorising readvances are incorporated in a building society mortgage,

(*g*) *Thomas* v. *Cooper* (1854) 18 Jur. 688.

(*h*) *Cf. Re Boys* (1870) L.R. 10 Eq. 467 (on a promissory note) and *Henniker* v. *Wigg* (1843) 4 Q.B. 792 (on a bond).

(*i*) The tendency, prior to the legislative achievements of 1925, was to limit the principle of constructive notice—see *The Birnam Wood* [1907] P. 1, at p. 14, *per* Farwell L.J.: "The courts have of late years been unwilling to apply the principle of constructive notice so as to fix companies or persons with knowledge of facts of which they had no knowledge whatever."

this will be conclusive (*k*), but in the absence of such documentary evidence a mortgagee whose mortgage is for a fixed sum would be well advised not to make readvances (*l*). But once it can be established that a mortgage impliedly covers further advances, section 94 extends the former law of tacking. Prior to 1926, tacking (other than by virtue of the legal estate) depended on notice to a subsequent mortgagee of a contractual right to tack, but the "legal estate" and "contractual" forms of tacking are fused into one statutory amalgam by section 94, and any mortgagee can now tack further advances "whether or not his mortgage is made expressly for securing further advances." Readvances were always a normal type of further advance under current account mortgages, and it follows that the "further advances" which may be tacked by any mortgagee under subsection (1) include readvances.

The result is that any mortgagee who can tack readvances to the security of his mortgage against his mortgagor, can do so also against any subsequent mortgagee of whom he has no notice, but registration will (as with further charges) constitute notice for this purpose. It follows that unless the mortgage is expressed to secure further advances, a readvance should be made only after the usual searches, although (as with advances on a current account mortgage) non-registration of a subsequent incumbrance will not of itself avoid that incumbrance against a prior mortgagee making a readvance.

The same position should apply to advances made, within the limit of the security, when a sum has been retained pending the execution of repairs and the retention is subsequently released, although such cases should be dealt with by means of a covenant to make further advances to secure the advantages of tacking without the necessity for further searches.

Stamping

This is most conveniently dealt with by reference to the three types of further advance already discussed:

(*k*) *Cf. Andrews* v. *City P.B.B.S.* (1881) 44 L.T. 641, where a covenant to observe the Society's rules, which provided for consolidation, was held to be notice to a puisne mortgagee of an express right to consolidate.

(*l*) The onus of proof of intention is on the party seeking to establish that there was a running security: *Melland* v. *Gray* (1843) 2 Y. & C.Ch.Cas. 199. It is not necessarily sufficient to take a receipt that an advance is made on the security of an existing mortgage. The authorities are old and not directly in point, and it is suggested that the material intention is the intention at the date of the mortgage, not at the time of the further advance.

(a) *Further charges.* These may be stamped in two ways:

1. Where the prior mortgage is not drawn to secure further advances, or where a further charge increases the limit contained in a current account mortgage, the further charge is stamped *ad valorem* as a new mortgage.
2. Where the prior mortgage is drawn to secure further advances without limit, the prior mortgage is treated as the primary security liable to *ad valorem* mortgage stamp duty on the highest amount at any time due, and each further charge is stamped as a collateral security and denoted with a duty paid stamp (*m*).

(b) *Bankers' clause advances.* Where the prior mortgage is drawn to secure further advances without limit, it is available only for the amount which it is stamped to cover, and when an advance is made in excess of that amount the security is treated for stamp duty purposes as a new instrument bearing date on the day on which the advance is made (*n*). Where the prior mortgage states a limit, stamp duty is charged on the amount of that limit, whether or not it is ever reached (*o*).

(c) *Readvances.* This is devoid of authority, but on general principles it appears that a receipt for release of a retention or even for a readvance, if endorsed on the mortgage, is exempt from stamp duty (*p*). A separate receipt should bear a receipt stamp, unless it contains a fresh agreement or covenant for repayment, in which case it becomes a collateral security and liable to duty as such.

Land charges registration (*q*)

(a) *Further charges.* Where the original mortgage is secured by a deposit of title deeds, the further charge will receive the same protection from registration as a puisne mortgage or general equitable charge. Where the mortgage to which the further charge is supplemental is itself a puisne mortgage, the further charge will constitute a fresh mortgage and will require registration as such (*r*).

(*m*) See Memorandum circulated by the Commissioners of Inland Revenue in 1954.

(*n*) Stamp Act, 1891, s. 88 (2).

(*o*) Stamp Act, 1891, s. 88 (1). *International Power & Paper Mills of Newfoundland, Ltd.* v. *C. I. R.* (1933) 12 A.T.C. 413.

(*p*) See Stamp Act, 1891, "Receipt," Exemption (ii).

(*q*) As to registration of mortgages by companies, and registration of documents affecting land in Yorkshire, see *infra*.

(*r*) See Fisher and Lightwood, *op. cit.*, p. 544; Kelly's *Draftsman*, 9th ed., p. 392. The only suggestion to the contrary is in the curious wording of L.P.A., 1925, s. 115 (7), that "where the mortgage consists of a mortgage and further

(b) *Bankers' clause advances and readvances.* The principal security will be registered as a land charge unless secured by a deposit of the title deeds, but readvances and further advances (not being further charges) are covered by the principal security and do not require registration as separate mortgages. It is, indeed, difficult to see what could be registered in the case of a bank taking a puisne mortgage to secure a current account, and if each separate cheque were regarded as creating a fresh registrable charge the system of priority notices would render impracticable any second mortgage to a bank to secure a current account (*s*).

Companies registration

A mortgage or charge on land created by a company registered in England (or by a company incorporated outside England which has an established place of business in England) is void, so far as any security on the company's property is concerned, against the liquidator and any creditor of the company, unless registered with the Registrar of Companies within twenty-one days after the date of its creation (*t*).

The Land Charges Act, 1925, s. 10 (5), provides that registration under the Companies Act " shall be sufficient in place of registration under this Act, and shall have effect as if the land charge had been registered under this Act." By virtue of this provision, the effects of non-registration are twofold:

(1) Under the Companies Act an unregistered charge is void against a subsequent incumbrancer (as a creditor of the company) even though he has express notice of its existence (*u*). This applies to all mortgages, whether or not secured by a deposit of title deeds, and to all further charges, since they create a fresh charge on land of the company.

(2) Under the Land Charges Act, mortgages not secured by a

charge " a vacating receipt may be endorsed on either. If this presupposes a composite mortgage made up of separate charges, it could be argued (but not very convincingly) that there is only one mortgage for purposes of registration. The corresponding provision (s. 42) of the Building Societies Act, 1874, contemplates a mortgage and further charge as separate entities.

(*s*) *Cf. Esberger & Son* v. *Capital & Counties Bank* [1913] 2 Ch. 366 on the application of the registration provisions of the Companies Act, 1908, s. 93, to a current account mortgage: " It would be impossible, I think, to say that the creation of the charge was at one date as regards the sums that were then owing, and at another date as regards sums which become owing in the future. Such a construction would render the working of section 93 of the Act exceedingly difficult, and [that] is something that may be taken into account in construing that language "—*per* Sargant J.

(*t*) Companies Act, 1948, ss. 95 and 106, corresponding to the 1908 Act, s. 93, and 1929 Act, ss. 79 and 90.

(*u*) *Re Monolithic Building Co.* [1915] 1 Ch. 643.

deposit of title deeds which are registered under the Companies Act will be entitled to the positive effects of land charges registration, and such mortgages which are not registered will be subject to the additional disabling provisions of section 13 (2) of the Land Charges Act, 1925.

Further advances made under a current account mortgage are not themselves registrable charges, and for the purpose of registration within twenty-one days the date of creation of a current account mortgage is the date of execution and not the date of any advance on the security of the mortgage (*a*).

Tacking and priorities

Tacking is only a part of the law relating to the priority of mortgages, and does not affect the possibility that some other charge (not being a mortgage) will take priority over any further advance. Section 94 gives only a right to make further advances in priority to subsequent mortgages; it does not confer on a mortgagee the right to make further advances which will rank in priority to any other instrument or matter which is registrable as a land charge. A few examples will illustrate the position:

(1) A local land charge may have been registered after the mortgage and before the further advance, which might even take priority over the prior mortgage (*b*). Whilst such charges can be regarded as essentially matters to take into account in valuation, a mortgagee making a further advance without having a fresh valuation does so at his own risk.

(2) A receiving order in bankruptcy or a deed of arrangement may have been registered against the mortgagor, and whilst a regular perusal of *Stubbs* may minimise the risk of this being overlooked and constitutes a good practical safeguard, it is open to the scope of human fallibility.

(3) An option to purchase may have been registered against the mortgagor in respect of a contract to sell at a price sufficient to discharge the mortgage but insufficient to discharge subsequent further advances. In such a case the mortgagee would lose his security for the further advances.

These considerations render any further advance made without searching under the provisions of section 94 (2) less secure than the original mortgage advance, and clearly the counsel of perfection

(*a*) *Esberger & Son* v. *Capital & Counties Bank* [1913] 2 Ch. 366.

(*b*) Some local land charges bind future purchasers and so, it appears, in effect take priority over a previous mortgage, notwithstanding the provisions of L.P.A., 1925, s. 104, *e.g.*, a street works charge and a nuisance order.

is to search in every case. The risk of being prejudiced by a subsequent registration may be slight, but it cannot be entirely discounted, and a solicitor acting for a mortgagee in the making of a further advance should in all cases explain the risks involved and, if it is decided to rely on the bankers' clause, obtain written instructions to dispense with searches.

Effects of section 94

It is sometimes said that the effect of section 94 is to extend the pre-1926 law of tacking by virtue of the legal estate to all mortgages, legal or equitable (*c*). The writer would suggest that its effect is rather to abolish tacking by virtue of estates and to establish in its place the sanctity of contractual tacking.

On analysing the types of tacking preserved by the section, it will be found that contractual provisions figure largely. The benefits of the bankers' clause are limited to mortgages "made expressly for securing a current account or other further advances," *i.e.*, mortgages of the *Hopkinson* v. *Rolt* type, where tacking has always depended on contractual stipulation. In subsection (1), two of the three cases of tacking referred to are contractual in origin: the right to postpone securities by consent, and the right to make further advances under covenant. This leaves only one type of tacking analogous to the pre-1926 type of tacking by virtue of estates: the right of a mortgagee to tack further advances in priority to a subsequent mortgage of which he has no notice at the time the further advances were made. The right to tack readvances depends ultimately on an express or implied term of the mortgage contract. This leaves only further charges, where the hypothetical notice imported by registration prevents tacking, and the theoretical freedom from notice inferred by non-registration applies only when an intermediate mortgage is already void against a further charge and it is consequently unnecessary to call in aid the right to tack.

Tacking in Yorkshire (*d*)

The doctrine of tacking by virtue of estates was abolished in Yorkshire by section 16 of the Yorkshire Registries Act, 1884, since priorities in Yorkshire are determined by section 14 of that Act: "All assurances entitled to be registered under this Act shall

(*c*) Halsbury's *Laws of England*, 2nd ed., Vol. 23, p. 528, note (*u*); Fisher and Lightwood, *op. cit.*, p. 509.

(*d*) "Yorkshire" is used throughout as a convenient abbreviation for the three Ridings of Yorkshire, each of which has its own deeds registry. The City of York is not within the jurisdiction of any deeds registry.

have priority according to the date of registration thereof and not according to the date of such assurances, or of the execution thereof."

Tacking by virtue of contract was not abolished, although it was for a short while rendered ineffective by section 15 of the 1884 Act: "The registration of any instrument under this Act shall be deemed to constitute actual notice of such instrument and of the fact of such registration to all persons and for all purposes whatsoever." The serious effects of this section on bank mortgages led to its repeal in 1885.

When section 15 was virtually re-enacted by the Law of Property Act, 1925, s. 197, it was necessary to provide that this operated "without prejudice to the provisions of this Act respecting the making of further advances by a mortgagee."

Legal mortgages of land in Yorkshire secured by a deposit of the title deeds can be registered only in the deeds registry. Although it appears to be optional to register other legal mortgages either in the deeds registry or the land charges registry (*e*), it is submitted that the only safe procedure is to register such mortgages in the deeds registry, and this is certainly the usual practice. If a mortgagee (whose mortgage is registered in the deeds registry) grants a further charge (also registered in the deeds registry), after the registration of a second charge as a puisne mortgage under the Land Charges Act, 1925, the position is as follows:

(1) The first mortgagee cannot tack under section 94 because the registration operates as actual notice of the second charge.

(2) Registration as a puisne mortgage is not sufficient in place of registration under the Yorkshire Registries Act, 1884 (*f*).

(3) Section 14 of this Act provides that no person shall lose any priority "merely in consequence of his having been affected with actual or constructive notice."

(4) The further charge will rank in priority to the second mortgage by virtue of its prior registration in the deeds registry, notwithstanding the land charges registration and the provisions of section 94.

Tacking by agreement with a subsequent mortgagee and tacking under a covenant to make further advances, both of which are expressly preserved by section 94, were never forms of tacking by virtue of estates, and tacking by virtue of contract was never abolished in Yorkshire. Since it has already been submitted that

(*e*) See *Encyclopaedia of Forms and Precedents*, Vol. 13, p. 144; Emmet on *Title*, 14th ed., Vol. 2, p. cxxviii.

(*f*) Nor is registration under the Companies Act, 1948, s. 95, which only replaces land charges registration.

contractual tacking alone survives under section 94, it is also submitted that that section does not, as is sometimes said (*g*), revive the doctrine of tacking in Yorkshire.

There is no provision in the Yorkshire Registries Act, 1884, comparable to section 13 (2) of the Land Charges Act, 1925, whereby unregistered charges are void against subsequent purchasers, but if a mortgage is not secured by a deposit of the title deeds it becomes, by virtue of its non-registration in the deeds registry, registrable as a puisne mortgage under the Land Charges Act, 1925, and the avoiding effects of section 13 (2) of that Act will thereby be brought into operation.

The mode of registration in Yorkshire is as follows:

(1) All legal mortgages, whether or not secured by a deposit of the title deeds, should be registered in the deeds registry.

(2) Equitable charges secured by a deposit of the title deeds are not registrable at all.

(3) Equitable charges not so secured are registrable as general equitable charges in the land charges department of the local deeds registry (*h*).

(4) Further charges are governed by the same rules as to registration as the mortgages to which they are supplemental (*i*).

(5) Bankers' clause advances, and readvances, do not require registration in the deeds registry because no legal estate is thereby transferred or created, and no legal charge is created.

Practical conclusions

If the above analysis is correct—and it is difficult to be dogmatic in view of the cumbrous, unwieldy and inverted machinery used in the 1925 legislation to subvert the supremacy of the legal estate—it is suggested that the practical consequences are as follows:

1. That all mortgages should be drawn expressly to secure further advances within the limits of the intended security. This will enable a mortgagee to readvance on the security of the original mortgage in priority to subsequent registered mortgages of which he has not received personal notice.

(*g*) Halsbury's *Statutes*, 2nd ed., Vol. 20, p. 1118; Emmet on *Title*, 14th ed., Vol. 2, pp. 275, 278.

(*h*) L.C.A., 1925, s. 10 (6).

(*i*) L.P.A., 1925, s. 11 (1), and see *Credland* v. *Potter* (1874) 10 Ch.App. 8; *pace* Emmet on *Title*, 14th ed., Vol. 1, p. 583, where it is suggested that after 1925 a further charge does not require registration in Yorkshire.

2. That if the mortgage is not so drawn, a mortgagee can still readvance any sum which has been paid off the mortgage debt *if* the mortgage incorporates provisions (such as the rules of a building society) authorising such readvances, or if it can be inferred by other means that the mortgage was intended to constitute a running security. Any such readvance should be made only after all the usual searches, since registration of an intermediate charge will be tantamount to actual notice.
3. That every second or subsequent mortgagee should register a priority notice against the mortgagor at least fourteen days before searching (*k*); search for prior mortgages and inquire as to the whereabouts of the title deeds; ascertain the amounts owing on all prior mortgages, and whether any prior mortgagee is under covenant to make further advances; complete his advance within fourteen days of the date of his search certificates, register his mortgage within twenty-eight days of the registration of the priority notice, and serve express notice of it on all prior mortgagees (*l*).

(*k*) To overcome the difficulty that a purchaser completing within fourteen days of obtaining an official certificate of search is not affected by any entry made after the date of the certificate and before completion. See L.P.A.A., 1926, s. 4 (2), and Mr. A. G. Robinson's stimulating article "The Value of a Search Certificate" (1956) 20 Conv.(N.S.) 229.

(*l*) The periods of fourteen and twenty-eight days are exclusive of Sundays and other days when the Registry is not open to the public: L.P.A.A., 1926, s. 4 (3).

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Timmins v. *Moreland Street Property Co., Ltd.*
[1957] 3 W.L.R. 678; [1957] 3 All E.R. 265 (C.A.)

Contract for sale of land—memorandum in writing—contents—joinder of documents—Law of Property Act, 1925, *s.* 40.—At a meeting the plaintiff and X, a director of the defendant company, orally agreed that the plaintiff should sell and the company buy certain freehold property which was subject to a lease with forty-two years to run. X gave the plaintiff a cheque for £3,900 drawn in favour of the plaintiff's solicitors. The plaintiff then had typed, signed and handed to X a receipt acknowledging the receipt from the company of £3,900 " as a deposit for the purchase of Nos. 6, 8 and 41, Boundary St. (Shoreditch) (freehold) which I agree to sell at £39,000." Subsequently, the defendants repudiated the contract; on the plaintiff suing for damages the defendants failed to substantiate allegations of misrepresentation and concealment, but succeeded in their further contention that there was no memorandum in writing to satisfy the Law of Property Act, 1925, s. 40. The case is reported on three points considered by the Court of Appeal (Jenkins, Romer and Sellers L.JJ.) (1) whether the omission in the cheque and receipt of any reference to the outstanding lease would in any event prevent an adequate memorandum existing; (2) whether the fact that the receipt came into existence after the cheque prevented the two from being connected; (3) apart from the above points, whether the two documents could be connected so as to form the needed memorandum signed by the party to be charged.

On the first point, the court held that if the documents could be connected, the memorandum would be adequate. Jenkins L.J. stated the principle as follows:—" A description of this kind [*i.e.*, that in the receipt cited above] is to be taken as extending to the whole of the vendor's interest in the property, so that the memorandum on the face of it records an agreement for the sale and purchase of the whole of such interest. Moreover, unless the contrary appears, such interest is to be taken as comprising the fee simple in possession free from incumbrances, and the purchaser will be entitled to reject any interest less than that. But if it is shown that at the time when the oral contract was entered into the purchaser knew that the interest actually possessed and offered for sale by the vendor was subject to an irremovable incumbrance, such as a lease, then the presumption that the interest agreed to be sold by the vendor is the fee simple in possession free from incumbrances will, *quoad* that incumbrance, be rebutted, and the purchaser will be bound to accept a conveyance subject to that incumbrance as a sufficient performance of the

contract" ([1957] 3 W.L.R. at p. 682; [1957] 3 All E.R. at p. 269). The learned lord justice then reviewed various authorities on the point, including *Re Gloag and Miller's Contract* (1883) 23 Ch.D. 320, *Ellis* v. *Rogers* (1884) 29 Ch.D. 661, and *McGrory* v. *Alderdale Estates* [1918] A.C. 503. The prima facie presumption, it may be added, includes a term that vacant possession will be given—*Cook* v. *Taylor* [1942] Ch. 549. On this part of the case Romer L.J. drew a somewhat more subtle distinction, saying that if the existence of the lease was part of the bargain between the parties, it required mention in the memorandum, but that here the contract was for the sale of a freehold reversion ([1957] 3 W.L.R. at p. 693; [1957] 3 All E.R. at p. 277). With respect, it is not entirely easy to see, in a case such as the present, by what criteria the court should incline to one or other interpretation of the transaction. On the other hand, the leasehold position would presumably be "part of the bargain," if, say, delayed completion of a sale of a large estate was contemplated and in the meantime the vendor was to exercise leasing powers. In such an event, however, no doubt there would be a formal contract—indeed, the surprising thing in the present case is that the parties did not agree "subject to contract."

On the second point, the Court of Appeal had no difficulty in holding that two documents coming into existence as part of one transaction carried out at one meeting are contemporaneous documents capable of referring to one another (distinguishing on the facts *Turnley* v. *Hartley* (1848) 3 New Pract.Cas. 96; 11 L.T.(o.s.) 112, where a vendor signed conditions of sale some hour after the auctioneer had signed particulars for the purchaser).

So far the plaintiff had succeeded, but he lost the case on the third point. The court rejected the suggestion that documents can be read together provided only that the connection can be seen *ex post facto* if they are placed side by side, and held that the document signed by the party to be charged must refer expressly or by implication to some other document or transaction, relying on *Long* v. *Millar* (1879) 4 C.P.D. 450 and *Stokes* v. *Whicher* [1920] 1 Ch. 411 and not approving, in effect, *Burgess* v. *Cox* [1951] Ch. 383. Jenkins L.J.'s statement of the rule may be cited in full as likely to become the *locus classicus*:—"it is still indispensably necessary, in order to justify the reading of documents together for this purpose, that there should be a document signed by the party to be charged which, while not containing in itself all the necessary ingredients of the required memorandum, does contain some reference, express or implied, to some other document or transaction. Where such reference can be spelt out of a document so signed, then parol evidence may be given to identify the other document referred to, or, as the case may be, to explain the other transaction, and to identify any document relating to it. If by this process a document is brought to light which contains all the terms of the bargain so far as not contained in the document signed by the party to be charged, then the two documents can be read together so as to constitute a sufficient memorandum for the purposes of section 40 of the Law of Property Act, 1925. The laying of documents side by side may, no doubt, lead to the conclusion as a matter of *res*

ipsa loquitur that the two are connected; but before a document, signed by the party to be charged, can be laid alongside another document to see if between them they constitute a sufficient memorandum there must, I conceive, be found in the document signed by the party to be charged some reference to some other document or transaction" ([1957] 3 W.L.R. at p. 692; [1957] 3 All E.R. at p. 276). Here the cheque contained no sufficient reference to enable the receipt to be connected.

The Law Reform (Enforcement of Contracts) Act, 1954, which repealed most of section 4 of the Statute of Frauds, 1677, did not, of course, touch the Law of Property Act, 1925, s. 40. Moreover, contracts relating to land were outside the terms of reference of both the Law Revision Committee (Cmd. 5449 of 1937) and the Law Reform Committee (Cmd. 8809), which recommended the reform. Yet the arguments canvassed in their reports are relevant also to contracts relating to land—the question is whether the inexperienced "small man" needs and gets protection from the requirement of writing. In the present case, Sellers L.J. thought the statute worked an injustice ([1957] 3 W.L.R. at p. 697; [1957] 3 All E.R. at p. 280). It would be interesting to know how often practitioners find it works justice.

Williams Brothers Direct Supply, Ltd. v. *Raftery*
[1957] 3 W.L.R. 931; [1957] 3 All E.R. 593 (C.A.)

Limitation of action—adverse possession—vacant land—effects of acts of user—Limitation Act, 1939, *ss.* 5, 10.—A right of action to recover land accrues, and time begins to run under the Limitation Act, 1939, when first, the person entitled "has been dispossessed or discontinued his possession" (s. 5 (1)) and, second, the land is in the possession of another in whose favour time can run—an adverse possessor (s. 10 (1)). On these sections "the plain case is where the true owner has been in possession and the other claims that he has done sufficient to dispossess him" (Preston and Newsom, *Limitation of Actions,* 3rd ed., p. 103). The effect of rival acts of possession is somewhat difficult of solution where the person entitled to the land cannot or does not, for one reason or another, make any active use of it. Then, as Bramwell B. said in *Leigh* v. *Jack* (1879) 5 Ex.D. 264, at p. 273: "acts must be done inconsistent with his enjoyment of the soil for the purposes for which he intended to use it." (This sentence is adopted in Halsbury, *Laws of England,* 2nd ed., Vol. XX, at p. 689.) In *Leigh* v. *Jack* the land in question was ultimately to be dedicated as a road, but before this could be done the defendant had stored foundry materials on it, and had eventually enclosed it some three or four years before the action brought. The Court of Appeal held, without hesitation, that the plaintiff had not been dispossessed. A contrasting case (see Preston and Newsom, *op. cit.*) is *Marshall* v. *Taylor* [1895] 1 Ch. 641, where the defendant was held to have effectually taken possession of a ditch which he wholly incorporated into his garden by paving and planting.

In the present case the dispute concerned some cleared vacant land (part of a larger area) which lay at the rear of premises of which the defendant was tenant and the plaintiffs head lessors. The plaintiffs intended to develop the land as and when this became possible. During the war a third party cultivated the land; from 1947 to 1949 the defendant had cultivated it and from 1949 had used it for breeding greyhounds; no enclosing fences were erected and between 1948 and 1953 the plaintiffs had come on the land occasionally. In his evidence the defendant said he thought that as tenant he could cultivate, as others were doing and " Not trying to take over land, not really. . . . Did nothing to keep plaintiffs off " ([1957] 3 W.L.R. at p. 934; [1957] 3 All E.R. at p. 594). The county court judge held that the plaintiffs had not actively discontinued their possession (Limitation Act, 1939, s. 5 (1)) but that the defendant and his predecessor in user had effectually dispossessed them. The Court of Appeal (Hodson, Morris and Sellers L.JJ.) now reversed the decision on the second point, following and adopting *Leigh* v. *Jack, supra,* and distinguishing *Marshall* v. *Tayer, supra,* on its different facts.

The decision is of particular current importance because it underlines the heavy burden which lies on a person asserting a dispossession of " unused " land. Sellers L.J., pointing out that many vacant bomb sites still cannot be built upon, said he was glad to think that as the years went by the owners would not lose their rights " merely by reason of trivial acts of trespass or user which in no way would interfere with a contemplated subsequent user " ([1957] 3 W.L.R. at pp. 941–942; [1957] 3 All E.R. at p. 599). Moreover, as Hodson L.J. emphasised ([1957] 3 W.L.R. at p. 936; [1957] 3 All E.R. at p. 596) the only question before the court was whether there was evidence on which the county court judge would have properly reached his decision. (Obviously the land had not got a net annual rateable value exceeding £60 so as to allow an appeal on a question of fact—see the County Courts Act, 1955, s. 12 (2) (b).)

It may be observed that a similar burden of proof may not rest upon a claimant to an easement of light over vacant land, for the law only requires that the light be actually enjoyed for twenty years. (Prescription Act, 1832, s. 3.) The Council of the Law Society have through the *Gazette* more than once drawn the attention of practitioners to the latter point, and it has recently been announced in the Press that the Lord Chancellor is appointing a Committee to investigate the matter.

Monmouthshire County Council v. *British Transport Commission*
[1957] 1 W.L.R. 1146; [1957] 3 All E.R. 384 (C.A.)

Highway—duty of repair—approaches to bridge—Railway Clauses Consolidation Act, 1845, *s.* 46.—The Court of Appeal (Jenkins, Parker and Pearce L.JJ.) has affirmed the decision of Lord Goddard C.J., noted *ante*, Vol. 21 at p. 232. The " immediate approaches " to a bridge, for the repair of which the British Transport Commission were liable under the Railway Clauses Consolidation Act, 1845, s. 46, did not include stretches of diversionary road built on either side of

the bridge. Jenkins L.J. who delivered the principal judgment, referred to a number of cases, including *London and North Western Ry.* v. *Skerten* (1864) 5 B. & S. 559 (relied on in the court below), *North Staffordshire Ry.* v. *Dale* (1858) 8 E. & B. 836, and *Bury Corporation* v. *Lancashire and Yorkshire Ry.* (1883) 20 Q.B.D. 458; but in the end dealt with the case as one of construction of the section in relation to the facts: " For my part, I prefer to found myself simply on the express terms of section 46, and to say that on the facts of the case, having regard to the relative positions geographically of the bridge itself and of the diversion road, it cannot possibly be said without abuse of language that the relevant part of the diversion road was part of the immediate approaches to the bridge " ([1957] 1 W.L.R. at p. 1152; [1957] 3 All E.R. at p. 389).

Jones v. *Mersey River Board* [1957] 3 W.L.R. 789; [1957] 3 All E.R. 375 (C.A.)

Land drainage—removal of material from river bed and deposit on banks—whether compensation payable—Land Drainage Act, 1930, *ss.* 34, 38, 81.—This was an appeal and cross-appeal by way of case stated from a decision of the Lands Tribunal on three preliminary points of law (Land Tribunal Rules, 1949, r. 37).

By virtue of the River Boards Act, 1948, s. 4 and Third Schedule, the Mersey River Board now has the powers and responsibilities conferred on drainage boards by the Land Drainage Act, 1930. Section 34 of that Act provides that in general compensation shall be payable where exercise of the statutory powers causes injury to any person; section 38 (1) provides that a drainage board " without making payment therefor or giving compensation in respect thereof " may appropriate and dispose of matter removed in widening, deepening or dredging a watercourse, and may deposit matter so removed on the banks of the watercourse or use it in other ways for the maintenance or improvement of those banks, or for any other work that the board have power to execute. Soil removed in widening the river Alt had been deposited on the appellant's land and the question was whether he could claim compensation.

The Court of Appeal (Jenkins, Parker and Pearce L.JJ.) now held: (1) Though the extent of a bank must be largely a question of fact and was not suitable for decision on a preliminary point of law, the best definition that could be given *in vacuo* was " so much of the land adjoining or near to a river as performs or contributes to the function of containing the river " (*per* Jenkins L.J. in words accepted by the other members of the court [1957] 3 W.L.R. at p. 797; [1957] 3 All E.R. at p. 380, following dicta in *Monmouthshire Railway and Canal Co.* v. *Hill* (1859) 28 L.J.Ex. 283, and an American case, *Howard* v. *Ingersoll,* 54 U.S. 381). The extent of a bank could not be limited to the slope facing the river. The definition in the Land Drainage Act, 1930, s. 81, was not found to be of assistance in the present case. (2) The exempting words quoted above from section 38 (1) applied to all types of operation mentioned in the section, but, having regard especially to the words " therefor " and " thereof " were

limited to the materials removed. In other words, section 38 (1) relieves a board from paying compensation for materials used, if they are used in any of the operations stated in the section, but it does not relieve them from paying compensation for injuries caused by the operation itself. In short, the appellant was not disentitled from claiming compensation for injury caused by the deposit of material on his land. (3) Section 38 (1) limited the permitted deposit to one which would improve the banks—not on the *ejusdem generis* principle properly so called but on the general construction of the subsection.

The Mersey River Board was given leave to appeal, so more will probably be heard of the case.

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2. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Lockwood [1957] 3 W.L.R. 837; [1957] 3 All E.R. 520

Intestacy—1952 amendment—ambiguity—Golden Rule—subsection restricted.—The 1925 legislation prescribes succession on intestacy by stocks. In default of nearer relatives, for instance, uncles and aunts succeed under section 46 (1) (v) of the Administration of Estates Act, 1925. If there are no uncles or aunts who take a vested interest there are gifts over. What if there are no surviving uncles or aunts, but they have left surviving issue, cousins of the intestate? Section 47 (3) makes it quite clear that issue of a class of relatives take in default of surviving members of the class, in the same way as issue represent deceased children of an intestate. Hence these cousins represent the uncles. The same is true of nephews and nieces, who stand in the shoes of deceased brothers or sisters. The Intestates Estates Act, 1925, re-enacts sections 46 (1) (v) and 47 (1) and (3). It then adds a curious amendment, in section 47 (5), that the estate will pass over, when members of the class of relatives fail, as if the intestate had died without leaving a member of the class *or issue of* a member. The express reference to issue seems to justify the conclusion that the word "member" refers to the original member only (Oliver Lodge (1956) 20 Conveyancer 399). This made it arguable that the law had been accidentally changed. However, it seems clear that the legislature in section 47 (5) were only dealing with the consequences of an application of section 47 (3) which is specifically referred to in section 47 (5). Section 47 (5) does not purport in any way to cut down section 47 (3). What this leaves of section 47 (5) is not clear. In the instant case Harman J. found it possible to ignore section 47 (5) entirely, on the ground of absurdity. If the subsection had changed the law it would mean that some original member of each class would have to survive before issue of deceased members could claim, *e.g.*, if a man left one brother surviving, then all nephews and nieces could take, but if no brother or sister survived

no nephews or nieces could take, and the estate would pass over to a remoter class. It would mean that survivors and issue of the half blood would be preferred to issue of the whole blood, which was not what the legislature could have intended. The decision is, with respect, clearly correct.

Re Thirlwell [1957] 3 W.L.R. 850; [1957] 3 All E.R. 46

General power—residuary bequest—no contrary intention.—In the case of *Re Jarrett* [1919] 1 Ch. 366, a testator exercised a general power of appointment in favour of X and left the residue of his estate to Y. Later, he expressly revoked the appointment to X. It was held that the property subject to the power passed under the residuary gift to Y though at the time of the will this was clearly not intended. This exemplifies the strong policy of the law in favour of such automatic exercise unless an intention to the contrary is absolutely clear. In the instant case the testatrix was the donee of three general powers of appointment. In her will she expressly referred to two of these powers. Roxburgh J. held that this was no sign of any sufficient contrary intention to prevent the third power being exercised. The onus of proof of such intention rested on anyone who said the power had not been exercised, and it had not been discharged in the circumstances. The learned judge gives some examples of cases of possible contrary intention, but admits these are purely dicta.

(Theobald 227)

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3. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Stratford v. *Syrett* [1957] 3 W.L.R. 733; [1957] 3 All E.R. 363 (C.A.)

Rent Acts—tenancy granted by beneficiary under trust for sale—no delegation of powers of management by trustees for sale—validity of tenancy—estoppel.—In 1939 the plaintiff, who was entitled for her life to the proceeds of sale arising under a trust for sale of a rent-controlled house, let the house to the defendant on a weekly tenancy. The trustees had authorised the plaintiff to manage the house, but there had been no formal delegation to the plaintiff of the powers of management of the trustees under section 29 of the Law of Property Act, 1925. In 1957 the plaintiff claimed possession of the house and made out a case for possession under section 3 (1) and paragraph (h) of the First Schedule of the Act of 1933: but the defendant contended (and the county court judge held) that (1) the plaintiff was not a "landlord" within the meaning of the Rent Acts, and (2) the doctrine of estoppel did not apply in Rent Act cases.

With regard to the first point the Court of Appeal held that there was a perfectly valid contract of tenancy between the plaintiff and the defendant. It was argued that, although the trustees had not in fact delegated their powers of management in the manner prescribed by section 29 of the Law of Property Act, it must nevertheless be assumed that they intended to do so, and that the plaintiff, although, in fact, she contracted in her own name, must be taken to have contracted in the names of the trustees in accordance with section 29 (2), so that the trustees (and not the plaintiff) occupied the position of landlord. But this argument was rejected on the ground that the trustees were not parties to the contract, and that there was no reason to suppose that the plaintiff was acting under section 29 at all. The trustees might have committed a breach of trust in allowing the plaintiff to manage the property otherwise than under section 29 : but that did not affect the position of the defendant, who had contracted with the plaintiff personally.

In these circumstances the question of estoppel did not arise and was not decided. But neither Lord Evershed M.R. nor Romer L.J. could see any reason why the doctrine of estoppel should not have applied.

Payne v. *Cooper* [1957] 3 W.L.R. 741; [1957] 3 All E.R. 335 (C.A.)

Rent Acts—absolute order for possession on ground of arrears of rent—payment into court before order executed—subsequent order for postponement of possession on conditions and for discharge of order upon compliance with conditions—validity and form of order —Act of 1923, *s.* 4 (2).—Section 4 (2) of the Rent and Mortgage Interest Restrictions Act, 1923, provides that in the case of any order or judgment for the recovery of possession of any dwelling-house or for the ejectment of a tenant therefrom, which has been made or given and not executed, "the court may adjourn the application, or stay or suspend execution on any such order or judgment, or postpone the date of possession for such period or periods as it thinks fit, and subject to such conditions (if any) in regard to payment by the tenant of arrears of rent, rent or mesne profits and otherwise as the court thinks fit, and, if such conditions are complied with, the court may, if it thinks fit, discharge or rescind any such order or judgment." The Court of Appeal held in this case that this subsection empowers a county court, even after an absolute order for possession has been made, to make an order postponing the date of possession upon conditions and providing also for the ultimate discharge of the order, if such conditions are performed—provided, of course, that the original order has not been executed. The court also held that there is no need for the final discharge to be contained in a separate order made after the conditions have already been complied with.

On February 13, 1957, the landlord obtained an absolute order for possession in twenty-eight days on the ground of arrears of rent. On May 6, 1957 (after certain payments by the tenant and one suspension, by consent, of the order for possession), it was ordered

that possession should be postponed for twenty-eight days on condition that on or before the date of expiration of the order the occupier should pay or have paid all arrears and costs, and that " on such payment the order for possession shall be discharged." The landlord contended that the county court judge had no jurisdiction to make the order of May 6, 1957, since the order of February 13, 1957, was unconditional and final: but the Court of Appeal unanimously rejected this contention. It was agreed that by ordinary law if a court made an absolute order for possession, it would not be competent for the court thereafter to interfere with that order. But the language of section 4 (2) is clear upon this point: and, in the view of Lord Evershed M.R., when once a court has suspended execution or postponed the date of possession, " an inevitable step has been taken which leads inexorably to the conclusion that all the other steps are equally available."

In effect, therefore, the court may convert what was originally an absolute order into a conditional order, and may then discharge the conditional order, if the conditions are satisfied. A court may not discharge an absolute order as such (see judgment of Somervell L.J. in *American Economic Laundry* v. *Little* [1951] 1 K.B. 400, 406). But this does not mean that an absolute order once made cannot thereafter be converted into a conditional order.

It was also thought that it would be an " altogether unwarrantable technicality " to hold that all the operations foreshadowed by section 4 (2) cannot be combined in one order. It is not necessary, in other words, to wait until any conditions have been satisfied, and then formally to get another order discharging the original order.

Addiscombe Garden Estates, Ltd. v. *Crabbe*
[1957] 3 W.L.R. 980; [1957] 3 All E.R. 563 (C.A.)

Landlord and Tenant Act, 1954—*business premises*—*" business "*—*members' club*—*lease or licence.*—The Court of Appeal has now had an opportunity of considering this case (see Vol. 21, p. 311) and has affirmed the decision of Hilbery J. on both points.

The court agreed that a lease of premises for the purposes of a members' lawn tennis club is a business tenancy to which Part II of the Landlord and Tenant Act, 1954, applies. " Business," it will be remembered, includes, for the purposes of Part II of the Act, " a trade, profession or employment " and " any activity carried on by a body of persons, whether corporate or unincorporate " (s. 23 (2)). In this case a " body of persons " was carrying on an " activity " in the shape of a lawn tennis club. There seems to be no real limitation on the words " any activity."

But the judgments in the Court of Appeal are mainly concerned with the distinction between a lease and a licence. Here again the court agreed with Hilbery J. that the agreement between the parties in this case, though described as a licence, was in substance a tenancy agreement. The plaintiffs had purported to " license and authorise " the defendants " to enter upon, use and enjoy " the premises in consideration of " court fees ": and the draftsman (to quote

Jenkins L.J.) "studiously avoided the use either of the word 'landlord' or of the word 'tenant' throughout the document." But the agreement, when read as a whole, was found in substance to impose on the grantee the rights and obligations of a tenant and on the grantor the rights and obligations of a landlord. All of its terms were wholly appropriate to a tenancy agreement: and some of them were wholly inconsistent with a licence.

In reaching their conclusion on this point, the court applied *Facchini* v. *Bryson* [1952] 1 T.L.R. 1386, particularly the statements of Denning L.J. (at p. 1389) that in cases of this nature the relationship of the parties "is determined by the law and not by the label which the parties put upon it," and that "it is not necessary to go so far as to find the document a sham."

But the statement of the same learned judge in *Errington* v. *Errington* [1952] 1 K.B. 290, 297, that "the test of exclusive possession is by no means decisive," was held to be too wide. Indeed, in the view of Jenkins L.J., that statement was qualified by Denning L.J. himself in *Facchini* v. *Bryson*. Save in exceptional cases the fact of exclusive possession, if not decisive against a licence, is still "a consideration of the first importance."

Leave to appeal to the House of Lords was refused.

Brown v. *Davies* [1957] 3 W.L.R. 818; [1957] 3 All E.R. 401 (C.A.)

Repairs—application for possession—covenant to keep in good repair "damage resulting from fair wear and tear excepted"—effect of exception—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, Sch. I, para. (a).—The Court of Appeal was mainly concerned in this case with the effect of an exception of "fair wear and tear" upon a tenant's repairing covenant. But a question also arose upon the true construction of paragraph (a) of the First Schedule to the Rent Act of 1933, which gives a county court power to make an order for possession of a dwelling-house if any "obligation of the tenancy . . . has been broken or not performed."

The landlord of a rent-controlled house claimed possession of the house on the ground that the tenant had broken his covenants (1) "to use and occupy the premises in a fair and tenantable manner and keep the interior clean and in good repair and condition and decorated except as to dilapidations resulting from reasonable wear and tear accidental fire or the act of God . . . ," and (2) "to keep manage and cultivate the garden in a good and husbandlike manner and free from weeds and so deliver up the same at the end or sooner determination of the tenancy. . . ." Breach of the second covenant was admitted, so that there was clear jurisdiction to make the order. It was argued, however, that in coming to the conclusion that it was reasonable to make the order, the county court judge had misdirected himself in law with regard to the effect of the repairing covenant. The effect of an exception of fair wear and tear, it was argued, is to negative all the tenant's repairing obligations, unless it can be shown that the state of repair is due

to some active or wilful damage done by the tenant as a tenant: and *Taylor* v. *Webb* [1937] 2 K.B. 283 was cited in support of this contention. But *Taylor* v. *Webb*, it was held, lays down no such general proposition. The Court of Appeal, applying a passage from the judgment of Tindal C.J. in *Gutteridge* v. *Munyard* (1834) 1 Moo. & R. 334 (which was not cited in *Taylor* v. *Webb*), held that as a general rule a tenant who is absolved from liability for fair wear and tear must still "take care that the premises do not suffer more than the operation of time and nature would effect." The construction of each particular covenant must always depend upon its own words: but on the facts of this case, in the view of Lord Evershed M.R., "if proof is given that the tenant is not keeping the premises in a fair and tenantable manner and not keeping the interior clean and well repaired and decorated, then at the very least the tenant must establish that the matters complained of ought to be attributed to dilapidation or damage resulting from reasonable wear and tear and to nothing else." The burden of proof was on the tenant.

It was also argued that the county court judge had misdirected himself in that he had taken into account past breaches of the repairing covenant as well as breaches still in existence at the date of the hearing. Upon the facts of the case it was found unnecessary to decide this question. The opinion was expressed, however, that a court has power to make an order for possession under the Act of 1933 provided that there "has been" at some time a breach of an obligation imposed on the tenant under the tenancy. The tenant need not, it seems, still be in breach of such obligation at the date of the hearing.

Joel v. *Swaddle and another*
[1957] 1 W.L.R. 1094; [1957] 3 All E.R. 325 (C.A.)

Landlord and Tenant Act, 1954—*business premises—landlord's intention to reconstruct—"reconstruction."*—This is yet another decision on the meaning of the words "reconstruct" and "reconstruction" in section 30 (1) (f) of the Landlord and Tenant Act, 1954. In this case the tenant of a shop and two storage rooms separated by brick walls and of a watercloset separated from the back storage room by a yard, which together formed part of the ground floor of certain premises, applied for a new lease. The landlord opposed the application on the ground that he intended to convert the whole of the ground floor (including the yard) into an amusement arcade. The proposed work involved removal of all the internal walls and of the back wall, lowering of the floor by eight inches and substitution of steel girders and pillars for the interior supporting walls. The Court of Appeal held that in determining whether the work proposed by the landlord in these cases amounts to "reconstruction" of the premises one must look at the position as a whole and compare the results on the premises of carrying out the proposed work with the condition and state of the premises before the work was done. It is apt to be dangerous to consider each item of work in isolation. Viewed from that standpoint, the

proposed work in this case did amount to a "substantial work of reconstruction" within section 30 (1) (f) of the Act.

Percy E. Cadle & Co., Ltd. v. *Jacmarch Properties, Ltd.* [1957] 1 Q.B. 323 (noted at Vol. 21, p. 168) was distinguished on the facts. But the statement of Ormerod L.J. ([1957] 1 Q.B. at p. 329) to the effect that "reconstruction" must mean "in the first place a substantial interference with the structure of the premises and then a rebuilding, probably in a different form, of such part of the premises as has been demolished by reason of the interference with the structure," was adopted.

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4. *REVENUE CASES*

By David R. Stanford, m.a., ll.b., Barrister-at-Law

(*Note*:—Where a case is not reported in any of the general series of law reports it is cited from *Taxation Reports* (T.R.).)

Carson v. *Cheyney's Executor* [1957] 3 W.L.R. 768; [1957] 3 All E.R. 391; [1957] T.R. 261 (C.A.)

Income tax—death of author—royalties received after death

Statutory provisions: Income tax Act, 1918, Sched. D, Cases II, III and VI (now the Income Tax Act, 1952, s. 123).

Point: "When a trader or a follower of a profession or vocation dies or goes out of business . . . and there remain to be collected sums owing for goods supplied during the existence of the business or for services rendered by the professional man during the course of his life or his business, there is no question of assessing those receipts to income tax; they are the receipts of the business while it lasted, they are arrears of that business, they represent money which was earned during the life of the business and are taken to be covered by the assessment made during the life of the business, whether that assessment was made on the basis of bookings or on the basis of receipts." The effect of discontinuance by death was thus stated by Rowlatt J. in *Bennett* v. *Ogston* (1930) 15 T.C. 374, at p. 378, in which case, however, he found the sums in question, the interest element in instalments on promissory notes falling due after the death of a deceased moneylender and collected by his executors, to be taxable as "interest of money" under Case III of Schedule D. Whilst the receipts of a business or profession escape tax if they accrue after the cesser of that business or profession the fruit of an income-bearing asset produced by the business remains subject to tax.

This principle was exemplified in *Stainer's Executors* v. *Purchase* [1952] A.C. 280, where the receipts accruing to the executors of the late Leslie Howard from the contracts entered into by him prior to his death were held by the House of Lords to be untaxable, the

contracts being but the machinery of payment, the source being the professional services. Now following that case, the Court of Appeal has held that receipts under contracts by an author with the publishers, *inter alia*, licensing the use of the copyright in works by the author, are not subject to tax in the hands of his executors. Whilst the author lived the royalties were taxable as receipts of the author's profession under Case II of Schedule D. After his death, the Case II assessment being no longer possible, no assessment under another case could be made. Although receipts by the executors by exploitation of the copyrights in the estate would be taxable under Case III of Schedule D, the residue of the receipts on professional contracts made during the author's life are merely the balance of the reward for his professional services, the licensing by the author of the copyright created by him being merely part of his professional activities.

Facts and decision: The late Peter Cheyney entered into contracts with publishers under which he was to write books, licence the copyright (which he retained) to the publishers and receive payment on a royalty basis. Further, he entered into contracts licensing the translation and publication of existing works of his, again receiving payment of a royalty basis. It was common ground that down to the date of his death Peter Cheyney was taxable under Case II of Schedule D on the royalties, but the Crown sought to contend that after his death the royalties were taxable under Case III of Schedule D, being income flowing from his copyrights. The Crown sought to establish that each time Peter Cheyney wrote a book he "created for himself property in the shape of the copyright in the work but that the copyright in each work as and when brought into existence constituted a potential source of income which became an actual source of income when a contract providing for royalty payments was entered into with a publisher."

Held: By the Court of Appeal, affirming Harman J. ([1957] 3 W.L.R. 344), that the receipts were not taxable, the case being covered by the decision in *Stainer's Executors* v. *Purchase* (*supra*).

Jenkins L.J., delivering the judgment of the court, stated "It is no doubt true that Cheyney obtained his royalties by licensing the copyright in his works to publishers. But the copyright did not drop from the skies. It was brought into existence by his professional activity in the writing of books and by nothing else, and it was just as much part of his profession to turn his literary labours to account by licensing the copyright he had created to publishers as it was to write the books in which the copyright subsisted."

Leave to appeal to the House of Lords was granted.

Scott v. *C. I. R.* [1957] T.R. 199 (Ch.D.)

Surtax—deed of covenant—release of power of revocation

Statutory provisions: Finance Act, 1938, s. 38; Finance Act, 1946, s. 28 (now Income Tax Act, 1952, ss. 404–415).

Point: It is frequently necessary for the purposes of fiscal legislation to determine when a settlement is made. Difficulties arise sometimes where some alternative provisions or changes in the original settlement are effected at a later date. In the present case a covenant was entered into in 1941 to make payments to trustees during the life of the appellant, which was revocable but only after August, 1948. The covenantor released the power of revocation in January, 1948, and it was necessary to determine whether the settlement under which payments were thereafter made was made on or after April 10, 1946, for only if it were made later than that date would section 28 of the Finance Act, 1946 apply thereto. This was not the case of a compound settlement and the liability to make payments arose under the original deed. The release of the power of revocation did not alter the source of the income which was the original settlement made in 1941.

Facts and decision: The covenantor in July, 1941, undertook to pay to trustees during the period of his life monthly sums which were to be applied for charitable purposes. It was desired that the deed should be revocable and in order to avoid section 38 of the Finance Act, 1938, (now the Income Tax Act, 1952, s. 404) the power of revocation was postponed and was not exercisable until after August 1, 1948. Prior to that date arriving the power of revocation was wholly released so that the settlement became irrevocable and the payments bound to continue during the life of the covenantor. By section 28 of the Finance Act, 1946 (now the Income Tax Act, 1952, s. 415), such a covenant ceased to be efficacious in removing the income paid under it from the income of the settlor for purposes of charge to surtax. This latter section only applies to settlements made on or after April 10, 1946, and it was contended by the Crown, who were upheld by the Special Commissioners, that the payments were now being made under a settlement made at the date of the deed of release of the power of revocation.

Held: By Harman J. that the payments were being made under the deed of 1941. The payments were made throughout under the 1941 deed and there was no reason to say that the income arose under any settlement made after April 10, 1946. Comparison should be drawn with cases based on the proviso to the Income Tax Act, 1952, s. 404 (1) where what is in issue is not the source of the payment itself, but the presence or absence of a suspended power of revocation (*cf. Taylor* v. *C. I. R.* [1946] 1 All E.R. 488; *C. I. R.* v. *Nicolson* [1953] 1 W.L.R. 809).

Re Hodge's Policy, Hodge v. *C. I. R.* [1957] 3 W.L.R. 958; [1957] 3 All E.R. 584 (C.A.)

Estate Duty—policy kept up for donee—property dutiable

Statutory provisions: Finance Act, 1894, s. 2 (1) (c); Customs and Inland Revenue Act, 1889, s. 11 (1).

Point: The Court of Appeal has now, with great distaste, affirmed the decision of Harman J. (noted at Vol. 21, p. 246) that

moneys payable under a policy of assurance effected by the deceased on his own life and kept up by him for the benefit of a donee are dutiable on his death, notwithstanding that the premiums ceased to be payable and the policy was fully paid up more than five years before the death. In the present case the policy was fully paid up thirty-four years before the death of the deceased, the policy moneys vested absolutely and indefeasibly in the donee, the son of the deceased, twelve years before the death, and yet the claim for duty was successful.

In construing section 11 (1), Customs and Inland Revenue Act, 1889, the words " is wholly kept up " and " is partially kept up " by the deceased for the benefit of a donee must be taken to refer to the payment of premiums during the period following the assignment of the policy to the donee and starting at the date of that assignment. The use of the present tense in the section is not sufficient to indicate that the keeping up must continue until the death. In consequence, such premiums as were payable after the assignment having been paid by the donor, the policy had been wholly kept up by the donor and on his death duty was exigible.

The Court of Appeal felt that the claim for duty was wholly devoid of any merit and that it was shocking to think that a liability for duty arose. Still, the merits of the claim do not affect the basis thereof and Lord Evershed M.R. stated that " if the language of the section imposes the duty, then it is the section and Parliament which have done the shocking thing, and it will likewise be for Parliament as legislators of today, if they suffer a similar shock, to alter the law."

Such legislation is anticipated.

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5. *PLANNING CASES*

By T. A. Blanco White, Barrister-at-Law

Francis v. *Yiewsley and West Drayton U. D. C.*
[1957] 3 W.L.R. 919; [1957] 3 All E.R. 529 (C.A.)

Enforcement notice—validity—time for taking objections.—The plaintiff in this case was served with a bad enforcement notice. Instead of appealing against it to the local justices, he waited (and was allowed to wait) until the local planning authority was out of time for delivering a fresh notice and then sued for a declaration that the notice was bad. Held, by the Court of Appeal, that he could maintain such an action notwithstanding his failure to appeal against the notice. What is more, the court, faced with the decision in *Perrins* v. *Perrins* [1951] 2 K.B. 414; 15 *Conveyancer* 188, that in such a case invalidity of the notice is no defence to a prosecution for disobeying the notice, said roundly that *Perrins* v. *Perrins* was wrong. (The judge below—see (1957) 21 *Conveyancer* 248—may well have thought the same, but was not in a position to say so.) According to

the Court of Appeal, failure to appeal against an enforcement notice deprives the landowner of the right to raise the invalidity as a defence, only in proceedings by the local planning authority under section 24 (1) of the Town and Country Planning Act, 1947, that is, proceedings to recover the money spent by the authority in carrying out on the land works to bring the land into compliance with the notice. If instead of doing the work the authority prosecutes under section 24 (3), invalidity of the notice is a defence, appeal or no appeal.

Just where this decision leaves us is not absolutely clear. *Perrins* v. *Perrins* was a decision of the Divisional Court in a criminal matter, and the Divisional Court could therefore adopt the line that the Court of Criminal Appeal has taken in the past and refuse to accept the authority of the Court of Appeal. Since, however, the Divisional Court itself has recently shown signs of regretting *Perrins* v. *Perrins*, it is more likely to accept the present decision.

Re Hasluck, deceased; *Sully* v. *Duffin* [1957] 1 W.L.R. 1135; [1957] 3 All E.R. 371

Development value—capital and income.—In this case, a local authority bought land, the price including an item for the unexpended balance of established development value. Different persons being interested in capital and income, the question arose which this item was. Held, that not only the unexpended balance of the original development value but the entire eight-sevenths of this amount (under section 17 of the Town and Country Planning Act, 1954) is capital.

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The Law of Real Property. By R. E. Megarry, Q.C., M.A., LL.B., of Lincoln's Inn, Reader in Equity in the Inns of Court, and H. W. R. Wade, M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. Stevens & Sons, Ltd. lxxxiii, 999 and (index) 33 pp. (£3 3s.)

This book is the full-scale work which has been promised in the prefaces to Mr. Megarry's *Manual of the Law of Real Property.* It is based on the manuscript of the *Manual*, revised and rewritten throughout by both authors (preface, p. v). Comparison with the *Manual* shows almost complete identity of chapter and section headings but a text, though naturally including much of the rightly praised *ipsissima verba* of the original, so much amended and enlarged as to constitute a new exposition. Moreover, there are also extensive footnotes, which constitute a striking feature of the book, containing both full citation of authority and discussion of many fine points: see, for example, the notes on possibility of reverter at p. 232, and on satisfied terms at p. 365. The writing has all that lucidity and force which we have come to expect of both authors and maintains its freshness and interest throughout: despite its length and detail, the text is never allowed to become a mere catalogue of rules. The book is also enlivened by a happy selection of quotations. This high general level of writing makes selection of particularly impressive passages difficult, but this reviewer would especially commend, by way of example, Chapter 4 on Law and Equity (described as "the very heart of the subject": p. 4); the account of Overreaching on pp. 346–358; Chapter 11 on Leases and Tenancies; the introductory discussion on pp. 890–897 of Adverse Possession, which is worth reading at an earlier stage; and the deceptive air of simplicity with which the essentials of a great deal of intractable material have been clearly set out in the chapter on Social Control of Land, where it was fortunately possible to include the main points of the Rent Bill which is now the Rent Act, 1957. This chapter meets admirably the needs of the general student of land law.

The plan of the book, already familiar to many through the *Manual*, is to deal first with a man's interests in his own land, then with his interest over his neighbour's land, and finally with ancillary topics (p. 3). So, after a brief introduction and account of tenure, Chapters 3–7 comprise: Estates (pp. 39–104), being a full account of the fee simple, fee tail and life estate including such matters as *Shelley's Case*, the barring of entails and the doctrine of waste; Law and Equity (pp. 105–168), containing an admirable outline of the 1925 reform at pp. 129–145; Future Interests (pp. 169–258), under the old and present law; Settled Land and Trusts for Sale (pp. 259–368) and Co-Ownership (pp. 368–412). At the end of the book come chapters on Registration of Encumbrances and Title (pp. 915–947); the Social Control of Land, mentioned above (pp. 948–985); and finally a survey and stock-taking of the 1925 legislation (pp. 986–993). It will be seen that this arrangement, the features of which are underlined by the length and detail of the book, lays emphasis on the historical development of the law and so necessarily gives some prominence to the pre-1926 law. The authors themselves write of presenting "the fundamental rules, with their new statutory superstructure . . . as one system" (p. 2). The book is therefore a successor in the classical tradition to such works on real property as *Challis* and *Williams*, nor should it suffer by such a comparison. In short, we have here a new and authoritative exposition of the law of real

property which will undoubtedly prove an enduring and invaluable addition to legal literature.

The book is intended for practitioners and students alike (preface, p. v). The former are likely to use it primarily as a work of reference and assisted by the excellent cross-referencing throughout the book, should find all they need. They will also suffer the temptation—to which they should succumb—to read at length once they start. Teachers of law, too, will find the book an invaluable aid, as will postgraduate and advanced students; *Megarry and Wade* will be an excellent starting point for detailed research and may, one hopes, stimulate a needed revival of interest in the law of real property. For the student who is coming fresh to the subject, however, this book is likely to be indigestible as his only diet, for he will lack the knowledge to discern the wood among the trees. What one can and should say here is that the good student will use the book frequently, and only a poor student will fail to consult it at all.

A few critical suggestions may be made. At pp. 174–175 the account of reversions may muddle the student through failing to explain sufficiently the differences between a reversion on a life interest and a reversion on a lease. Indeed, may not a discussion of the latter be out of place in a chapter entitled Future Interests? Practitioners will be particularly interested in the authors' views on the "curtain" provisions of the 1925 legislation. They say as regards settled land, first, that if a tenant for life in whose favour a vesting deed has been executed ceases to be the person in whom the legal estate should be vested (*e.g.*, because his determinable life interest ceases) he can thereafter convey the legal estate only subject to the equitable trust interests, because he no longer has the powers of a tenant for life (pp. 286–287); and second, that a purchaser from personal representatives must take the risk that the legal estate which he is taking has not vested in those particular representatives (p. 289). "The new conveyancing machinery has therefore smoothed the path of purchasers only at some risk to their titles" (p. 289). The first of these assertions seems, with respect, dependent on a wholly literal interpretation of the Settled Land Act. Is it not just as likely that the court will look at the Act as a whole, consider the mischief it was designed to prevent and the remedy provided (*Heydon's Case* (1584) 3 Co.Rep. 7a) and reach the conclusion that the tenant for life under a vesting deed retains all the overreaching and other powers of the Act until a new vesting deed is executed? The second point is valid where two grants of probate exist, one general and one limited to settled land, but it should be added that if there is only one general grant, *Re Bridgett and Hayes Contract* [1928] Ch. 163 held that the Law of Property Act, 1925, s. 204, protects a purchaser. Thirdly, the authors assert that where the legal and beneficial interests under a joint tenancy have vested in one person the statutory trust for sale ceases and "in such a case the purchaser is deprived of his right to insist on a conveyance from trustees for sale" despite the difficulty of proving non-severance (pp. 383–384). This may be right, but it should be stated that a strong body of opinion, including the Council of the Law Society, holds that a new trustee can and should be appointed (*Law Society's Gazette* (1955) Vol. 52, p. 159: for criticisms, see *Law Times*, Vol. 18, p. 317, Vol. 19, pp. 150, 217, and correspondence referred to).

Such passages as these, however, provoke thought if not necessarily agreement, and are, of course, of minor importance when viewed against the book as a whole. It is to be welcomed as a great work.

F. R. C.

Sergeant on Stamp Duties. 3rd ed. By B. J. Sims, ll.b., Solicitor. The Thames Bank Publishing Co., Ltd. lii, 374 and (index) 34 pp. (£4 4s.)

Mr. Sims is admirably qualified to edit a work on stamp duties: he was once in the company of the publicans and now, especially as he is the assistant

examiner responsible for the Revenue paper in the Law Society's Final, he is presumably to be classed among the sinners. The system adopted by the author was to work through the Stamp Act and then the Revenue and Finance Acts in chronological order. He added an appendix containing reports of some seven cases not reported in the more familiar reports. Mr. Sims decided against altering the system in favour of a narrative approach. Although we are inclined to agree that in a completely comprehensive work, the tabular form has to be followed to a greater or lesser degree, its defect for the practitioner is that it is difficult for him to find assistance in deciding upon any particular method of effecting a transaction if there are alternatives. The editor of the current edition of *Hanson* has shown that the two forms can be combined satisfactorily and we would have welcomed a full introduction by the editor.

We tested the book to the best of our ability and, so far as we can judge, it is comprehensive and up to date, though under the head "Bond Covenant" the point is not made that where the duty can be calculated both on the total amount payable or on the periodic sums the lower duty only is claimed. The editor does not always give us his assistance where there is a possibility of more than one view: for example, the official practice relating to contracts for the purchase of land with a partially-erected building is stated without comment. (The statement of practice has since been revised: *Law Society's Gazette* (1957), p. 450.) Again, although the *Cohen and Moore* v. *C. I. R.* [1933] 2 K.B. 126 line of cases is duly noted, the limits beyond which the Revenue's claims to stamp any scrap of paper subsequent to an oral transaction are not indicated.

No doubt small type had to be used if the size and cost of the book were to be kept within reasonable bounds; nevertheless, there is little excuse for so poor a standard of printing. This, however, is merely an irritant. The fact that it is used by the Stamping Office is a testimonial to the real value of the work. Mr. Sims has done well and is to be congratulated on what must have been an arduous task.

E. F. G.

We have also received:—

The Housing Act, 1957 (annotated). Sweet & Maxwell, Ltd. 159 pp. (£1 1s.)

This annotated copy of the Housing Act, 1957, is reprinted from *Current Law Statutes* with an introduction by Mr. D. Barlow, the assistant town clerk of Portsmouth, and an index. It is described as a forerunner of the publishers' *Encyclopaedia of Housing Law and Practice*. Housing law is no longer a law affecting social, health and safety services which can be left to the local government lawyers. Apart from closing and demolition orders and the like, there are matters such as grants and loans of considerable practicable importance to the ordinary practitioner. There is a table of about 100 cases which shows that the subject is already well developed. There is one of those comparative tables which is essential in relation to a consolidating Act during the early years of its life.

An Estate Duty Notebook. 2nd ed. By G. Boughen Graham, LL.B., Barrister-at-Law. The Solicitors' Law Stationery Society, Ltd. xvi, 130 and (index) 11 pp. (17s. 6d.)

This notebook gives shortly and pleasantly a survey of the subject, but, as is to be expected, it is really only a general introduction. If any point of real difficulty arises, the practitioner will have to turn to other works. The

passage on the Chancellor's concession (pp. 25 and 26) is out of date; the provisions of the Finance Act, 1957, s. 38 (pp. 89–93), are dealt with much too shortly; and there ought to be something on controlled companies.

An Introduction to Company Law. By J. A. Hornby, m.a., ll.b., Barrister-at-Law. Hutchinson & Co. (Publishers), Ltd. 188 pp. (18s.)

This is an elementary introduction to the subject, attractively written and up to date, though the author's views as to the advantages of companies over partnerships should be accepted only with considerable reservations. The book is not sufficiently advanced for candidates for the Law Society's Final. The publishers might be instructed that the accepted practice is to place the table of cases at the front, and not at the back, of the text.

Justice in Plato's Republic. By Peter Fireman. Philosophical Library Inc. 52 pp. ($2.00.)

We find some difficulty in understanding why anyone should have thought it worth while publishing this sort of essay as a book.